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THE CONSUMER AND INVESTOR ACCESS TO
INFORMATION ACT OF 1999

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HEARING
BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION
OF THE
COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 1858

JUNE 15, 1999

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THE CONSUMER AND INVESTOR ACCESS TO INFORMATION ACT OF 1999

TUESDAY, JUNE 15, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. W.J. "Billy" Tauzin (chairman) presiding.

Members present: Representatives Tauzin, Oxley, Stearns, Deal, Largent, Cubin, Shimkus, Blunt, Bliley (ex officio), Markey, Boucher, Luther, Sawyer, Green, and McCarthy.

Staff present: Justin Lilley, majority counsel; Cliff Riccio, legislative clerk; and Andy Levin, minority counsel.

Mr. TAUZIN. The subcommittee will please come to order. Members will be coming in as we commence, but I would like to get started. We have a very large panel this morning.

The subcommittee meets today to discuss H.R. 1858, Consumer and Investor Access to Information Act of 1999, which was introduced by our own Chairman, Tom Bliley, and has received strong bipartisan support from members of this committee.

Before we begin, I would like to extend a warm welcome to Dr. Gregory O'Brien, Chancellor of the University of New Orleans. We, of course, are delighted whenever we have a hometown guest here, and it is particularly good to see Chancellor O'Brien.

Given the intensified appeal and growth of the Internet, it is no longer clear what information, what analysis is proprietary and what is freely available to the public. Last week I read about a case which clearly demonstrates why this hearing is so important to the future of the Internet and electronic commerce in general.

Amazon.com the online book retailer, has a page on its Web site which lists the books on the New York Times best seller list. For each book on the list, Amazon presents a picture of the cover, the title, the name of author, the number of pages, the list price, the Amazon price, and a box to click if you want to purchase the book.

Moreover, you can click on another box to link to other information about the book, including published reviews, a biography of the author, a list of other books by the author offered by Amazon, and links to similar books.

In short, Amazon has taken a simple list of best selling books and converted it into quite a wonderful resource for consumers. The New York Times, however, may not see it that way. The Times

believes that Amazon.com is somehow misappropriating its property by identifying the books on the New York Times best seller list. It has sent a demand letter to Amazon.com, and Amazon.com has filed a declaratory judgment action.

It is unclear whether the New York Times will prevail on its copyrighted trademark theory. However, it is unquestionably clear that the New York Times would prevail if broad data base protection legislation were in place. In my opinion that would be a troubling result.

It is true that the New York Times best seller list is widely considered to be one of the most authoritative lists of which books are selling the most in American bookstores, and one must recognize the Times has invested resources in assembling the list.

That does not alter the reality that the list is nothing more than a collection of publicly available facts. The list represents the results of a survey, and those results are no less facts than the results of any other sampling done by scientists and pollsters every day, and the facts, once released, belong in the public domain.

Why should someone be civilly, not to mention criminally, liable for making use of publicly available facts, particularly in a free-speech society such as ours. The Times best seller list is not a list that the newspaper editors believe to be most worth reading; instead it purports to be a list of the books the American public, rightly or wrongly, is choosing to buy.

If the Times owns the identity of the books on its best seller list then the NBA by analysis owns the identity of the players with the highest scoring average. And United Airlines owns the information about published prices on its flights to New Orleans and NBC owns its broadcast schedule.

And if all these well-heeled entities own all this information, then surely they can prevent an Internet company from incorporating it in a larger data base to create a value for consumers, such as Amazon.com's bestseller page, or an electronic TV Guide, for that matter.

Let me make it clear that I don't think that people should have access to trade secret information. People should not be able to reproduce a copyrighted expression in a database. The selection and arrangement of the data as opposed to the data itself. Further, I don't think that companies should be able to engage in unfair competition with respect to databases.

I should not be able to copy a database compiled by Congressman Markey and publish it in substantially the same form and manner which competes with his database. There may be a narrow gap in the law that currently permits this in certain circumstances, and that gap should be filled. For that reason, I join my colleagues in cosponsoring Chairman Bliley's legislation, but we must take care not to overprotect databases.

As Alex Kozinski, a judge in the 9th circuit recently wrote, overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today likely since we obtained fire is genuinely new. Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before.

Overprotection stifles the very creative forces it is supposed to nurture. This is a fascinating issue as evidenced by a very diversified panel today. We just recently on this committee completed our work on the WIPO legislation, protecting intellectual property rights; and this committee has some good experience in understanding the very delicate relationship between fair use and protected use and protected rights of intellectual property.

Today we expand upon that information base. We grow in knowledge, and we ask you to share a little data with us today on whether or not Mr. Bliley's bill, as we believe, is taking the right cut in this very delicate balance.

We look forward to hearing our witnesses as to whether or not, in fact, we have struck that right balance today.

The Chair in anticipation of Mr. Markey's arrival will recognize the gentleman, Mr. Luther, if he is prepared for an opening statement.

Mr. LUTHER. No thank you, Mr. Chairman. Thank you for holding this hearing, and I do expect that Mr. Markey will have an opening statement that he wishes to put into the record. I do not have anything to add other than to thank you for holding the hearing, and I look forward to the testimony. You are indeed correct that this is a timely and important issue. Thank you very much.

Mr. TAUZIN. I thank the gentleman. With Mr. Markey it is always a great expectation.

The Chair is now pleased to yield to the chairman of the full committee, Mr. Bliley, for an opening statement.

Chairman BLILEY. Mr. Chairman, thank you for holding this hearing on H.R. 1858; and let me say at the outset that I thank my colleagues for their support of this legislation.

This bill is a critical component of the committee's electronic commerce agenda, and I look forward to working with them on ensuring swift enactment.

For many years economists have wondered whether our country's enormous investment in information technology, in computers and advanced telecommunications networks, actually increase productivity; but now even the economists are believers. No less an expert than Alan Greenspan, chairman of the Federal Reserve, recently observed that the current economic prosperity we are enjoying in the United States is largely attributable to our investment in information technology.

Just the other day, the University of Texas released its study titled *The Internet Economy*, which finds that in 1998 alone the Internet generated more than \$300 billion in revenue and was responsible for 1.2 million jobs. This is a mere 5 years after the birth of the World Wide Web.

To give my colleagues some sense of comparison, it took the automobile industry 100 years to scale such heights. The investment both public and private sectors have made in our information infrastructure are finally paying dividends in terms of allowing us to access and use information in a manner unprecedented in history.

A farmer in the Virginia Piedmont is now able to access from his home a wealth of information critical to his business. He can learn about soil conditions, weather trends, new pesticides, genetically enhanced seeds, and potential buyers in distant States.

A soccer mom in suburban Richmond is able to do price comparison on a new refrigerator, plan a family vacation, find a support group for her child with special educational needs, and even do her shopping.

All of the members of this committee are committed to promoting electronic commerce. We want to preserve consumers' privacy, protect security, and we want to promote the deployment of bandwidth, but let's be clear about what this is all about. It is about information and consumers' apparently insatiable demand for it.

That is why today's hearing is so important. This hearing will address a bedrock issue: Who will control information in the information age? On the one hand, we need to make sure that the compilers of information have sufficient incentive to engage in their difficult, but essential, work.

But at the same time, we need to make sure that we do not lock facts up; that we do not give anyone monopoly control over facts, for if we were able to do that, we would greatly restrict the ability of new firms to create innovative databases incorporating those facts.

As a practical matter, this would limit many of the wonderful uses of information the Internet permits. How do we achieve this delicate balance? Does existing law get it right or is some fine-tuning necessary? Can this fine-tuning be accomplished in a manner that does not run afoul of the first amendment of the Constitution or copyright laws?

My own view is that some targeted fine-tuning is needed, and it is for that reason that I introduced H.R. 1858, the Consumer and Investor Access to Information Act of 1999. I will be interested in hearing from today's witnesses whether H.R. 1858 embodies the appropriate approach for attacking this complex issue. Again, Mr. Chairman, thank you for holding today's hearing, and I yield back the balance of my time.

Mr. TAUZIN. Thank you. The Chair is now pleased to recognize the ranking minority member of the subcommittee, Mr. Markey, for an opening statement.

Mr. MARKEY. Thank you, Mr. Chairman, very much; and I would like to commend you, Chairman Tauzin, for calling this hearing today.

Mr. Chairman, the legislation that is the subject of today's hearing is an attempt to strike an appropriate balance between two important goals. The first goal is to halt the outright theft or misappropriation of databases. Individuals and entities spend time and effort to compile facts into databases, and their efforts should be legally protected from theft or misappropriation. I think everyone agrees with that basic concept.

The second goal is to ensure that in protecting against misappropriation, that Congress does not unwittingly stifle commerce, legitimate research and creativity. This country's economic future depends upon our Nation's ability to capture the lion's share of information-age jobs. If we thwart the ability of creative entrepreneurs to obtain and use facts to create new products, we are hurting our prospects for generating the knowledge-based markets we will need for job growth in a post GATT, post-NAFTA world.

Balancing these two goals is no doubt going to be a difficult task. Yet addressing these issues is an undertaking that this committee and this Congress must press forward on in order to put appropriate legal protections on the books for marketplace participants, and these protections should serve to both safeguard property from piracy and encourage competition in the electronic environment for our consumers.

Not surprisingly, the effort developed in this committee to balance these two legitimate policy goals treats databases as key items in electronic commerce, and recognizes that two or three people or 200 or 300 people can utilize exactly the same underlying data yet attempt to create distinctive new products.

This ability to utilize the same facts and to create new innovative services of products will be at the heart of our new electronic economy. Obviously, the people who create new databases or services from those root facts will want protection against piracy and misappropriation, and they should get that protection.

Creative expressive elements or originality should be permitted copyright protection because this is the appropriate role for copyright protection. However, such copyright protection should not extend to the underlying facts themselves.

Today we will hear from an expert panel, and I think that the panel will help us to better fine-tune the balance struck in the bill introduced by the chairman of the committee, Mr. Bliley; and I hope that by the end of the day each member of the committee will have a far better understanding of what ultimately a final piece of legislation should look like. I thank you, Mr. Chairman.

Mr. TAUZIN. Thank you, Mr. Markey; and the Chair is now pleased to recognize the Vice Chairman of the subcommittee, Mr. Oxley, from Ohio.

Mr. OXLEY. Thank you, Mr. Chairman. Before I make my opening statement, I would like to congratulate the new free throw champion for the House of Representatives, the last free throw champion of this century, the gentleman from Massachusetts, who converted 46 out of 50, one short of the record, I might point out, but still a very strong performance.

Mr. TAUZIN. Would the gentleman yield.

Mr. OXLEY. I would be glad to yield.

Mr. TAUZIN. We don't want any of you publishing that information.

Mr. OXLEY. My thanks to Chairman Bliley for H.R. 1858. This legislation is the next logical step for the law in the digital age. We are dealing with new digital technology and its use on the Internet. That invention has become the social phenomenon that will no doubt symbolize this decade.

Never before has it been so easy or so profitable to copy the intellectual creations of another. The bill is a fine addition to copyright law, bringing digital media under the legal concept that has stood for decades.

Despite the modern nature of the technology we consider today, the problem is as old as squatters in the old West who claimed land as their own. Sometimes you need a digital sheriff and a digital posse to keep everyone in line. I don't worry that we will have less information as a result of this bill. Those that create databases

deserve some modicum of protection of their work; that is what we seek to provide.

My committee, Finance and Hazardous Materials, will soon hold a hearing on title II of this legislation which specifically addresses stock data. We look forward to that in a few weeks. With that, I yield back the balance of my time.

Mr. TAUZIN. The Chair thanks the gentleman. The gentleman from Illinois, Mr. Shimkus, is recognized for an opening statement.

Mr. SHIMKUS. Thank you. As we found out last week in the markup of H.R. 10, database security, sharing information, trademark infringement, and privacy are at the core of the debate of the future. Hence, the importance of this meeting and this hearing.

I would like to take this time to personally extend my welcome to one of my almost-constituents, Mrs. Phyllis Schlafly. While she technically lives in Missouri, she rose to prominence as a leader of the conservative movement in south western Illinois. Phyllis, welcome to the hearing.

I apologize for missing the majority of the hearing, as I am scheduled to work on the House floor as Chairman of the Committee as a Whole, and with that, Mr. Chairman, I yield back the balance of my time.

Mr. TAUZIN. I thank the gentleman.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF FLORIDA

Mr. Chairman: This hearing on electronic database collection brings us across the threshold of the undefined legal area of the Internet.

As all of us who use the Internet on a daily basis knows, the remarkable growth of the Internet has largely been based on the lack of legal encumbrances and the lack of multi-layered tax structures.

The Internet is the democratic dream of pursuing and making use of information as the individual sees fit. But the question needs to be asked: What propriety interests do web sites and database collectors have from having the brunt of their offering to the public copied?

What are public facts that are free to retrieve and what does creative originality really mean in the world of the Internet?

The Committee staff has given us a news story detailing the use of the *New York Times* bestseller list by Amazon.com and the resulting litigation from its use. I hope the witnesses address the case and give us their view on whether the bestseller list is a propriety property or whether it is a public fact.

I know I have seen other newspapers in the country use the *New York Times* bestseller list. Have they done so on their own or have they engaged in a contractual relationship with the *Times* to do so? If Amazon.com or other web sites are prevented from using the list, do they have the legal protections to copy the *Times* list and use it on their own site and list it as a "Famous Newspaper Bestseller List." Where is the law in this regard or where should it be through new legislation?

I appreciate the work of Chairman Bliley in introducing a constructive bill that attempts to seek the middle ground in this area of database collection.

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF WYOMING

Thank you, Mr. Chairman, for holding this legislative hearing on H.R. 1858, the Consumer and Investor Access to Information Act of 1999.

This is a very timely hearing as the Subcommittee continues to wrangle with issues related to the Internet information age in general.

It is also timely in that we have all heard so much lately about the dispute between the *New York Times* and Amazon.com.

Because of the fact that this industry evolves at the speeds in which it transfers information, it is extremely important that the Subcommittee consider legislation that moves and adapts just as quickly.

It is certainly my belief, and has long been the philosophy of many of the members of the Subcommittee, that regulating the Internet and the information gathered and disseminated on the Internet will only harm this vibrant medium.

Where would Amazon.com, Yahoo!, Netscape, and other online companies be if the sharing of information and data was stifled or limited in any way?

H.R. 1858, I believe, walks that fine line in addressing what is currently at issue, the misappropriation and piracy of databases, without delving into issues that may or may not come up in the future.

To continue to keep information databases robust and allow investors to feel reasonably secure that databases are protected, Chairman Bliley's bill provides a distinction between the facts and information that reside in the public forum and how that information should or should not be shared and/or protected.

Ideally, it should be the marketplace—not government regulation or legislation—that governs the information industry.

Absent that, H.R. 1858 is a reasonable solution to this problem. Chairman Bliley should be commended for putting this initiative forward.

Thank you, Mr. Chairman, I look forward to hearing from our witnesses and yield back the balance of my time.

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you Mr. Chairman for holding this hearing on database information, the internet, and the future of electronic commerce and access to information.

The internet is the network connection of the thousands of different databases in our country and throughout the world. The internet has become a part of our everyday lives. We use the internet to accomplish everything from reading newspapers to researching specific issues to searching for the scores of our favorite sports teams. Everyday millions of Americans use a search engine such as, America-On-Line or Yahoo to access the thousands of different databases. Without any databases to provide this information the internet would have never succeeded and we would not have the thriving economy or the information explosion that we have today.

Accessing information on the internet is vital for our schools to maintain the open access to educational materials and resources. Schools spend thousands and thousands of dollars on purchasing access licenses to these materials. If we go too far in protecting information and databases will that hinder the access to educational materials or the growth of the internet?

We are living in a digital age, where access to information is vital to the continued growth of the internet. We do need to create a balance in this area. We need to protect the work, the thousands of hours it takes to compile and input information that companies have put into developing these databases, while fostering the competition and access necessary to keep the internet growing.

Again thank you Mr. Chairman for holding this hearing.

PREPARED STATEMENT OF HON. THOMAS C. SAWYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman, I want to thank you and the Ranking Member, Mr. Markey, for holding this legislative hearing today on H.R. 1858, the Consumer and Investor Access to Information Act. I also want to thank our witnesses for coming to testify on the merits of this legislation.

Intellectual property has been the driving force for innovation and economic growth in the United States from the very beginning. In fact, it is what has given us a basis and backbone to sustain a democracy. Accordingly, at various points in our history, there has come a point where there has been a pressing need to modify our national and international intellectual property policies. We are, once again, at a turning point in modernizing those laws for the digital era.

Contemporary technology has made it easier for copyrighted materials to be pirated. Capturing such information and widely distributing it without the consent of the author is illegal and should continue to be. However, the Internet has also given us a means of instantly tapping into information databases for a myriad of purposes—from comparing prices of airline flights to getting the most up-to-date information on medical treatments. In many instances, the publisher of the database that was used as a search engine would like to have some copyright protection for

the information they collected. However, the Supreme Court ruled earlier this decade that copyright protection does not apply to databases that do not contain creativity or originality; facts, ideas and discoveries are not protected. Therefore, what used to have copyright protection because of a publisher's time and the amount of financial investment that was put into the database no longer applies.

Under H.R. 1858, pirating copyrighted material would still be unlawful. The legislation would also make it illegal to duplicate an existing database and using that information to compete against the database's creator. I recognize the need to strike a balance with respect to giving database publisher's protection. However, there is an area that I think needs further clarification. If the average citizen took a database or parts of a database from another source, newspaper or magazine, and downloaded to their personal web page, not for competing against the company who created the database, would that person be in violation of the law under H.R. 1858? There seems to be some confusion with this provision, and I think we need to clarify that a little more for everyone.

I would also like to make a point that the opponents of this legislation object to the provision that requires them to seek recourse with the Federal Trade Commission if they believe their information has been pirated or an entirely new database was not created using their information. I hope the FTC's authority does not supersede contractual agreements established between two parties, giving database publishers the ability to also seek legal recourse through the courts.

Mr. Chairman these are a few points I wanted to mention. Once again, thank you for holding this hearing this morning. As we all know the Internet has profoundly reshaped the way we do things. As I said before, I recognize there is a need to make modest changes to current law to reflect the Internet's capabilities. However, it would be a shame to regulate it to the point where basic information gathering and competition is stifled.

Mr. TAUZIN. I understand that Chancellor O'Brien is on his way down. We will proceed with the panel.

By the way, Phyllis, we are not going to keep you to the end, we are going to hear from you in the middle. We are anxious to hear all of your testimony. For the record without objection all members' written statements are made a part of the record, and for the record all witnesses' written statements are made a part of the record without objection. Which means that we would like you to summarize your statements, if you can, within what we call the 5-minute rule and that little green and red light indicates when your time is just about up.

Please summarize within 5 minutes the very key points of your testimony in as conversational tone as you can so we can engage you in the dialog. We will begin by recognizing a frequent visitor to our subcommittee, Mr. Andrew Pincus, general counsel of the Department of Commerce.

STATEMENT OF ANDREW J. PINCUS, GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Mr. PINCUS. Thank you, Mr. Chairman. It is an honor to appear before the subcommittee on this very important issue related to our digital economy.

In the last Congress it was an honor under Secretary Daley's leadership to work with you on the WIPO implementation bill, and we think that bill was a tremendous achievement in leading the world on the appropriate way, as Mr. Markey said, to balance these two difficult interests; and we look forward to working with Chairman Bliley and the members of the subcommittee on this issue as it moves forward in this Congress.

The issue of database protection is a matter of great interest to a large number of Federal agencies for a variety of reasons. The government collects, manages, and disseminates massive amounts

of information, perhaps more than any in the world. We fund research that produces information, and in our knowledge-based economy, information is key.

We, of course, want to do everything we can to continue our remarkable economic growth; and we, therefore, want to maximize incentives for data collection to expand the available universe of information without putting in place any unjustifiable obstacles to competition, innovation, or use of that information.

And, of course, we want to be sure that any law enacted complies with the Constitution. We have spent a great deal of time developing an administration position that takes account of these very perspectives, and I would like to summarize it. It is set forth at length in my written statement.

We agree with Chairman Bliley and the other members of the subcommittee that spoke that there is a gap in the law that should be filled by new legislation. We support the enactment of a statute to protect database creators against free-riding, the wrongful taking and distribution of database material with resulting infliction of commercial harm on the database creator.

Digital technology permits the creation and distribution of a large number of perfect copies of data files at the touch of a button and therefore expands dramatically the risk that, in the absence of adequate legal remedies, piracy, or the threat of piracy, will deter investment in database creation.

Of course, we believe it is very important to craft this legal protection carefully to optimize the benefits and to minimize disruption of research activities, competition, and innovation that is essential for our economy to continue to grow. I know that the members of the subcommittee are sensitive to those concerns, and H.R. 1858 clearly works at balancing those competing concerns. We set out in the written testimony a number of comments with respect to the specifics of the legislation. Maybe I can highlight a few.

First is the question of how to enforce this new legal right. We believe that a private right of action is necessary. As in other areas where the question is how to provide a legal environment that will provide an incentive for investment and deter piracy, there is a need for certainty of enforcement; and we are very concerned that the Federal Trade Commission will not have the resources, given its other responsibilities, to provide a level of enforcement that will be necessary to deter the bad actors that are out there.

Second is the question of a term of protection. We believe that, as in other areas of—where there is some intellectual property like protection, there should be a protection for a limited term of years; and we have said that we think 15 years is really the outside limit.

Third, the question of protection of government data. We agree with the basic premise of H.R. 1858 that government data should not be protected, that if the public pays for it, sponsors its collection, it should not have to pay for it twice.

We think that H.R. 1858, perhaps, could be expanded to deal with the question of government-financed collection of data where there is a government—is not actually doing it itself, and that is perhaps another area that we could work with you on.

Finally, the question of fair use. We want to be sure that whatever protections are ultimately put in law are tempered by fair use

protection that is at least as broad as the fair use protection that is available under the copyright laws, and that is an issue that we would like to work with you on.

To summarize, this is a complicated area. We would very much like to work with the subcommittee as the legislative process moves forward. We agree on the basic principles, but there are some details that we would like to work with you on further.

[The prepared statement of Andrew J. Pincus follows:]

PREPARED STATEMENT OF ANDREW J. PINCUS, GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Mr. Chairman and Members of the Committee: Thank you for this opportunity to present the Administration's views on H.R. 1858, the "Consumer and Investor Access to Information Act of 1999."

I. INTRODUCTION

As we have stated in the past, the Administration views database protection legislation from a number of perspectives: as a creator of data and a user of it; as an advocate both of economic incentives for socially useful investment and of open, market-based competition free from artificial barriers; and as an entity committed both to effective law enforcement and to the First Amendment. Reconciling these perspectives is difficult in any context. The digital economy's rapid and unpredictable change makes this challenge even greater.

The Administration believes strongly in free markets, in which firms can meet demand for new products and services without having to overcome artificial barriers that keep consumers hostage to an undesirable status quo. However, we also recognize that there are circumstances in which markets need legal mechanisms in order to function efficiently. The *Feist* decision¹ conclusively eliminated one form of legal protection for databases. Undeniably, *Feist* has altered the landscape, but the topography is still changing in ways that pull in different directions as to the nature and extent of protection that is needed.

In particular, the emerging digital environment has significant implications for this issue. It has become commonplace to observe that information is the currency of our economic age. That puts a premium on designing a legal schema that creates sufficient incentives to maximize investment in data collection—to expand the available universe of information—without putting in place unjustified obstacles to competition and innovation. Moreover, digital technology permits the creation and distribution of a large number of perfect copies of data files at the touch of a button. Those data files may constitute all, or significant portions of, commercial databases. This new technology expands the risk that, in the absence of adequate legal remedies, piracy, or the threat of piracy, will deter investment in database creation. For all of these reasons, it is important to calibrate new private rights carefully—to optimize overall economic and social benefits, to prevent unfairly undermining investments and agreements premised on the current law, and to preclude new opportunities for thwarting competition.

The U.S. Government has an unique stake in database legislation because it collects, manages, and disseminates massive amounts of information, possibly more information than any other entity in the world. In all these processes, it interacts with the private sector in a variety of ways. In addition, Federal agencies are engaged in funding research that produces tremendous amounts of information that the government does not undertake to manage itself.

These activities represent enormous investments in highly complex knowledge management processes that are vital to human health, the environment, national security, scientific progress, and technological innovation—and, in turn, to the economy as a whole. Changes in ground rules for the use and reuse of information must be designed to minimize disruption of these critical activities and to avoid imposition of new costs that could hinder research.

The sections which follow discuss the Administration's efforts to study database protection and access issues (Part II) and summarize the six principles that we believe should guide both domestic legislative and international treaty efforts in this area (Part III). Next, we elaborate on each principle, discussing the Administration's

¹ *Feist Publications v. Rural Telephone Service Corp.*, 499 U.S. 340 (1991).

concerns relating to that topic and particular provisions of H.R. 1858, as well as some additional concerns with aspects of the bill. (Part IV).

The Administration congratulates Chairman Bliley and the other members of the Committee involved in drafting H.R. 1858 for their thoughtful efforts to draft a simple bill that is targeted on the dangers of unchecked piracy. At the same time, the Administration has had only a very limited amount of time to consider the provisions of H.R. 1858. For that reason, the comments provided below are not as extensive as other Administration analyses of database protection issues or legislative proposals, such as H.R. 354. The Administration's work on database protection has been an intensive, interagency effort (as described in Part II below), and we have not yet been able to bring all these resources to bear in our analysis of H.R. 1858. For that reason, we hope that we may provide you, at a later date, with any further comments that you may desire on this legislation.

II. HISTORY OF ADMINISTRATION STUDY OF DATABASE ISSUES

In response to legislative proposals in the Congress and developments in the World Intellectual Property Organization (WIPO), the Administration devoted substantial energy in 1998 and 1999 to studying database protection and access issues. The Administration's review of these issues has included a variety of mechanisms and fora:

- The Patent and Trademark Office (PTO) held a public conference on database protection and access issues on April 28, 1998.
- During the spring and summer of 1998, a variety of Executive Branch departments and agencies participated in an informal working group on database issues led by the State Department, the Office of Science and Technology Policy (OSTP), and the PTO.
- In January 1999, the National Research Council (NRC) held a two-day conference on scientific databases at the Department of Commerce. This conference was supported by the National Science Foundation, the National Institutes of Health, and several other agencies.² The NRC is expected to issue a report this summer.
- Various officials in the Executive Office of the President (including OSTP), the Department of Commerce (including PTO), and the Justice Department have held informational meetings with both proponents and opponents of database protection legislation.

In addition to these efforts, the Administration has carefully studied a wide range of reports, studies, legal opinions and legislation on database protection and access from the United States, Canada, Japan, and the European Union, as well as participating in discussions of database protection issues at WIPO conferences in 1996, 1997, and 1998.

The Administration continues to discuss these issues with concerned parties and to examine specific topics and areas where we believe further information will help both the legislative process and any future study of the effects of database protection that might be mandated by legislation.

III. GENERAL PRINCIPLES

On August 4, 1998, in response to Senate consideration of then-H.R. 2652, the Administration set out the principles that it believes should govern database protection legislation.

Now, as then, Administration supports legal protection against commercial misappropriation of collections of information. We believe that there should be effective legal remedies against "free-riders" who take databases gathered by others at considerable expense and reintroduce them into commerce as their own. This situation has arisen in recent case law, and we believe that digital technology increases opportunities for such abuses.

At the same time, the Administration has significant concerns with provisions of H.R. 1858, both on policy grounds and because the Constitution imposes significant constraints upon Congress's power to enact legislation of this sort. From a policy perspective, the Administration believes that legislation addressing collections of information should be crafted with the following principles in mind:

² Including the National Oceanic and Atmospheric Administration (NOAA), the National Institute of Standards and Technology (NIST), the U.S. Geological Survey, the Department of Energy, and the PTO.

1. A change in the law is desirable to protect commercial database developers from commercial misappropriation of their database products where other legal protections and remedies are inadequate.
2. Because any database misappropriation regime will have effects on electronic commerce, any such law should be predictable, simple, minimal, transparent, and based on rough consensus in keeping with the principles expressed in the "Framework for Global Electronic Commerce."³ Definitions and standards of behavior should be reasonably clear to data producers and users prior to the development of a substantial body of case law.
3. Consistent with Administration policies expressed in relevant Office of Management and Budget circulars and Federal regulations, databases generated with Government funding generally should not be placed under exclusive control, *de jure* or *de facto*, of private parties.
4. Any database misappropriation regime must carefully define and describe the protected interests and prohibited activities, so as to avoid unintended consequences; legislation should not affect established contractual relationships and should apply only prospectively and with reasonable notice.
5. Any database misappropriation regime should provide exceptions analogous to "fair use" principles of copyright law; in particular, any effects on non-commercial research should be *de minimis*.
6. Consistent with the goals of the World Trade Organization (WTO) and U.S. trade policy, legislation should aim to ensure that U.S. companies enjoy available protection for their database products in other countries on the same terms as enjoyed by nationals of those countries.

We believe that these principles also embody some of the Constitutional concerns with legislation in this area. With these principles in mind, we turn to an analysis of H.R. 1858.

IV. DISCUSSION

A. First Principle— Protect against commercial misappropriation

A change in the law is desirable to protect commercial database developers from commercial misappropriation of their database products where other legal protections and remedies are inadequate.

As we have stated previously, the Administration supports enactment of a statute to protect database creators against free-riding—the wrongful appropriation and distribution of database material with resulting infliction of commercial harm (loss of customers) on the database creator. We believe that there is considerable, if not complete, consensus that this kind of free-riding can occur without additional legal protection for non-copyrightable databases and that such legal protection is necessary to prevent a diminution in database creation.⁴

Section 102 is the operative core of H.R. 1858 for databases outside the securities markets; it provides the "basic prohibition" of this proposal to protect databases through a misappropriation model.⁵ Section 102 prohibits unauthorized selling or

³A Framework for Global Electronic Commerce is available at: <http://www.ecommerce.gov/framework.htm>.

⁴See, e.g., National Research Council, *Bits of Power* (1997) at 135; U.S. Patent and Trademark Office, *Report on and Recommendations from April 1998 Conference on Database Protection* (1998) at 4-7; Letter from Federal Trade Commission Chairman Robert Pitofsky to Congressman Tom Bliley, September 28, 1998 at 6-7. See also Institute of Intellectual Property, Tokyo, Japan, *Database Protection on the Borderline of Copyright Law and Industrial Property Law 5* (1998); Wendy Gordon, *Asymmetrical Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 863-865 (1992) (describing conditions when additional protection is needed); Dan L. Burke, *The Market for Digital Piracy*, in BRIAN KAHN AND CHARLES NESSON, EDS., *BORDERS IN CYBERSPACE* (1997), 205 (describing databases on the Internet as classic "public good" problem that may require special law); J.H. Reichman and Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 *Vanderbilt L. Rev.* 51, 55 (1997) (critical of EU Database Directive and H.R. 3531 of the 104th Congress, but recognizing that risks of market failure may keep data production at "suboptimal levels"); M. Powell, *The European Union's Database Directive: An International Antidote to the Side Effects of Feist?* 20 *FORDHAM INTERNATIONAL L. J.* 1215, 1250 (1997).

⁵There has been much discussion among commentators about the differences between a *sui generis* form of protection as was proposed in H.R. 3531 in the 104th Congress and the "misappropriation" approach proposed in H.R. 1858 (as well as H.R. 354). The Administration believes that the misappropriation theory provides an appropriate model for database protection in American law. The United States has substantial case law on the misappropriation of information as a form of unfair competition which should help courts interpret any database protection law built on a misappropriation model. Placing database protection in the framework of unfair competition will also allow courts and commentators to draw appropriately from the rich body of cases in trademark law and unfair business practices.

distribution of a "database" that is a "duplicate" of a prior database "collected and organized by another person" where the new database is sold or distributed "in competition" with the original database. Section 101 provides definitions of these key concepts.

The drafters of H.R. 1858 have understood that the problem of misappropriation includes the distribution of significant parts of databases as well as entire databases. To address this problem, section 101(1) provides that a discrete section of a database "may be treated as a database." We recognize that the intent of this "discrete section" provision is to protect identifiable subsections of databases from wholesale misappropriations, but we very are concerned that this definition could create liability for insubstantial distributions from databases, particularly in the digital environment.

For example, the book edition of a national database of hotels might subdivide hotels by state and city; in such a situation, we understand that the intent of section 101(1) would be to create liability when a competitor misappropriated all of the Sacramento, California or Cincinnati, Ohio listings from the national database, even though this might only be a small part of the national database. But in a digitized form, the same national hotel database can have discrete sections organized by state, by city, by neighborhood, by quality rating, by hotel ownership or chain participation, by price, by the availability of particular services (conference rooms of such a size, gym facilities), etc.—so that many, if not most, distributions of material from the database could trigger the "discrete section" provision.

Indeed, the coverage provided by section 101(1) appears likely to be more subject to technological vicissitudes and manipulation by private parties than a "substantial" taking measure, i.e., defining a "database" as a complete database and providing that a "substantial" distribution of material appropriated from it could trigger liability. A substantial appropriation requirement has the virtue of allowing courts to apply reasonable, evolving standards against possible manipulation by private parties. Defining a database to include a discrete subset of the database invites database producers to format their products so as to make small amounts of the data appear as "discrete," therefore liability-triggering, subsets. We therefore recommend against this approach.

By requiring "extraction" from a pre-existing database, the definition of "duplicate" in section 101(2) seems intended to ensure that the basic prohibition of section 102 would not create liability for a database that was independently developed, but was nonetheless a "duplicate" (in the everyday meaning) of the pre-existing database. We are not sure, however, that the definition achieves this purpose. Imagine, for example, that a database was 98% independently gathered material, but the remaining 2% came from "extracting information from [a pre-existing] database." It could be argued that the new database "was made by extracting information from [the] other database." Because H.R. 1858 does not provide any express exception for *verification*, it could also be said that a new database product "was made by extracting information from [another] database" when, in fact, all the new database producer did was to check the accuracy of its independently collected work against the pre-existing database.

Of course, the scope of the basic prohibition of section 102 depends greatly on the interpretation given to "in competition." Section 102(5) provides a bifurcated test for when a new database is in competition with a pre-existing database. The first element requires that the new database "displaces substantial sales or licenses of the database of which it is a duplicate." Our initial impression is that this is similar to the standard we have advocated in relation to H.R. 354—that is, other conditions being met, there would be liability when the new database causes "substantial harm" to the pre-existing database's market.⁶ This approach also is consistent with the standard under many states' general misappropriation laws.

The second element of the bifurcated test for "in competition" requires that the new database "significantly threaten[s] the opportunity to recover a return on investment" in the pre-existing database. We are concerned that this standard is too vague. Would a significant threat to any return on investment be sufficient for pur-

The Administration believes that any treaty on database protection that emerges from ongoing discussions at the World Intellectual Property Organization should permit each treaty signatory to provide any mandated database property protection through the legal mechanism most appropriate to its domestic law, whether through misappropriation, *sui generis* protection, or a simple extension of their domestic copyright and neighboring rights laws. The critical issue is not the legal framework used, but whether the law provides private citizens with comparable rights to protect their investments in different jurisdictions.

⁶ See Statement of Andrew J. Pincus before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, March 18, 1999, at 5. [hereinafter Administration Statement on H.R. 354]

poses of the test, or is this intended to be a reasonable return on investment? Our concern with this element of the "in competition" test is the same as we have expressed elsewhere concerning the "diminution of incentive" test inspired by the *National Basketball Association v. Motorola* case.⁷ While we agree that a misappropriation law should be focused on acts that do, in fact, have a tendency to reduce incentives in this manner, we think these types of tests do not comport with our principle (described below) that a database protection law should be predictable, simple, and transparent. Because a competitor cannot be expected to know much about the incentive structures that lead to the production of the first database, such a competitor would have no way to judge in advance whether or not her acts would "threaten" recovery of "a return on investment," particularly where the statute does not say what kind of return on investment.

In addition, this test is problematic because it does not take account of the cumulative effects of repeated acts of blatant piracy. Suppose several different persons duplicated all or a substantial portion of the database, but the effect of each duplication fell just short of "significantly threatening to the opportunity to recover a return on the investment" under the test. Cumulatively, however, these acts would indisputably deny a return on an investment. Our fear is that this standard, in comparison with a substantial harm approach, will not provide appropriate incentives for people to invest in the creation of databases. For these reasons, we believe that some variation of a harm test can achieve the necessary purposes and be both easier for private parties to understand and for courts to apply.

Finally, we have previously testified before the House Committee on the Judiciary's Subcommittee on Courts and Intellectual Property that while the Administration continues to believe that misappropriation for commercial purposes should be the focus of any legislative efforts, we recognize that some acts of duplication by individuals, when systematic, could conceivably undermine the commercial market for a database product. We are not familiar with any reported cases or incidents of this kind, but we recognize that such harm could occur. Such damage may occur when those acts become customary in a particular economic sector or field of research. At present, if there is no contract with the individual or her organization, the investor in a database has no effective civil remedy against such acts.⁸ We believe that one of the greatest challenges in drafting database protection legislation is providing database producers with some type of protection against such *patterns* of repeated individual acts of duplication without prohibiting uses of data by individuals that, in the opinion of many, should be treated as "fair uses" permissible under the First Amendment. We are not certain whether a balance can be struck, but we note that section 102 does not address this problem. We look forward to working with the Subcommittee and all concerned parties on this problem as the legislation moves forward.

B. Second Principle—Keep it simple, transparent, and based on consensus

Because any database misappropriation regime will have effects on electronic commerce, any such law should be predictable, simple, minimal, transparent, and based on rough consensus in keeping with the principles expressed in the Framework for Global Electronic Commerce. Definitions and standards of behavior should be reasonably clear to data producers and users prior to the development of a substantial body of case law.

The preceding section identified at least one of the ways in which Title I of H.R. 1858 does not fulfill the Administration's goal of a database protection law which is predictable and transparent. We also believe that there are some additional aspects of H.R. 1858 which may unnecessarily complicate the bill. For example, we are concerned that some aspects of the definition of a "database" may complicate application of the section 102, generating uncertainty and, possibly, unnecessary litigation. The section 101(3) definition of "information" expressly excludes "works

⁷ 105 F.3d 841, 852 (2d Cir. 1997). For the Administration's discussion of this issue, see Administration Statement on H.R. 354 at 5.

⁸ 18 U.S.C. § 1030 would appear to create *some* criminal liability for database misappropriation by individuals in the on-line environment. Subsection 1030(a) (2) (C) creates criminal liability when a person "intentionally accesses a computer... and thereby obtains... information from a protected computer if the conduct involved an interstate or foreign communication," while section 1030(a)(4) creates criminal liability when a person "knowingly and with intent to defraud, accesses a protected computer without authorization... and by means of such conduct... obtains anything of value" in excess of \$5,000. We assume that the server holding a commercial database would fall within the definition of a "protected computer" because it would be "a computer... which is used in interstate or foreign commerce or communication [1030(e) (2)(B)]." Subsection 1030(g) also creates civil liability where there has been a "violation" of the section.

of authorship," making databases composed of such works ineligible for section 102 protection. It is unclear whether the phrase "works of authorship" is intended to apply only to original works of authorship under 17 USC 102 or if it is intended to encompass non-copyrightable works which, nonetheless, appear to be text written by identifiable authors (that is, "non-original" works). For example, would real estate listings which may lack sufficient creativity for copyright be ineligible for database protection? Unless this is clarified, the express exclusion of "works of authorship" may cause unnecessary litigation in defining protected databases.

In the same vein, section 104(c)(2) would exclude from protection any database integrated into a software program where the database is "an element necessary to the operation of the computer program." We appreciate the effort in section 104(c)(2) to distinguish data entries from instructional software code, but a database embedded in software will often be "an element necessary to the operation" of the software in the sense that the software will stop running if the data entries are not available as inputs to the software code; that the database is "necessary" to the operation of the software does not mean that it should lose the possibility of being covered by a database protection law.

Of considerable concern are the enforcement provisions for Title I. While most, if not all other proposals for database protection, provide for a private cause of action, only the Federal Trade Commission (FTC) would be empowered to enforce the prohibition created in Title I of H.R. 1858. On policy grounds, the Administration is very concerned about both the lack of a private cause of action and the placement of enforcement responsibilities with a single government entity. While vesting exclusive jurisdiction in the FTC may reduce the risk of abusive litigation, we believe that this is better addressed by establishing suitable thresholds for private causes of action.

Placing enforcement of the law solely in the hands of a government agency distinguishes H.R. 1858 from a wide range of laws which provide for both a private cause of action *and* government enforcement (such as antitrust law, computer crimes and eavesdropping). In short, Congress has generally considered it wise to permit private parties to enforce laws bearing on commerce. A database protection law will stimulate database production only to the degree that it is *perceived* as having meaningful enforcement. A database producer cannot be sure that a newly charged government agency will protect its products from misappropriation in the same way that the producer could plan to make provisions to willingly defend its own investment.

Inasmuch as subsection 105(b) expressly preempts state laws inconsistent with the bill's provisions, H.R. 1858 appears to *eliminate* private causes of action that now exist under many state laws. This replacement of private causes of action with exclusive government enforcement could be considered a step backward by many. Even if the enforcing government agencies had sufficient resources and expertise, this development would not be in keeping with the Administration's commitment to market mechanisms to develop the information economy. As a general approach, we believe that is better for the government to establish ground rules for interaction among private parties and then allow enforcement of those rules by the private parties concerned.

C. Third Principle—Preserve access to government data

Consistent with Administration policies expressed in relevant Office of Management and Budget circulars and Federal regulations, databases generated with Government funding generally should not be placed under exclusive control, de jure or de facto, of private parties.

Section 101(6) defines a "government database" as a database "collected or maintained" by any agency or instrumentality of the United States or any database required to be collected or maintained by Federal statute or regulation. Section 104(a)(1) then provides that the basic prohibition does not extend to these databases. Section 104(a)(3) further provides that where a Federal, state, or local government substantially funds the creation or maintenance of a database, that government may "establish[] by law or contract" that the resulting database will not enjoy protection under the bill's basic prohibition.

As we have consistently stated, the Administration believes that a database protection law generally should not protect government investment in generating data. There are three reasons for this conclusion. First, database protection proposals are premised on the need to provide an *incentive* for investment in data gathering; in the case of wholly government-funded information, no incentive is needed. If a government decides that it is in the public interest to collect information on smog levels, education scores, or solar flare activity, it will do so. Second, there is a widespread sentiment that once data generation has been paid for with government

funds, taxpayers should not have to pay "twice" for the same data. Finally, the U.S. Government has historically pursued policies that strongly favor public funding of the creation and collection of information. The Administration believes that these policies have contributed greatly to the success of America's high technology and information industries as well as the strength of our democratic society. The Administration has stated previously:

"Government information is a valuable national resource. It provides the public with knowledge of the government, society, and economy—past, present, and future. It is a means to ensure the accountability of government, to manage the government's operations, to maintain the healthy performance of the economy, and is itself a commodity in the marketplace."⁹

The Administration believes that the free flow of government-generated data is an important engine of economic growth; it will be an increasingly important resource for any society intent on creating jobs, businesses, and wealth in the "Information Age." Often, government-generated information is also critical to the health and safety of the population; we must ensure that any database protection law does not hamper the dissemination of such information.¹⁰

For these reasons, we believe that the definition of a "government database" should be broadened to encompass all databases created on behalf of the government or with substantial government funding—from any level of government, not just Federal. The definition should be broadened to encompass all government-generated information, whether created as the result of direct government activity or as a result of a government contract or grant. This matter should not be left to local, state, and Federal agencies to decide.

Instead of drawing a distinction between information directly generated by the government and information substantially funded by the government, we believe that the focus should be on the funding source. Information generated with public finances should be treated the same regardless of the vehicle used to generate the information. We recognize, however, that many valuable cooperative efforts involve funding for a variety of sources and in these cases, it may be desirable to give some recognition to the non-government contributions.¹¹ In exploring the need for such flexibility,¹² the Subcommittee should consider whether the presumption should be reversed: instead of permitting agencies to expressly "opt-out" of database protection in government contracts and grants (section 104(a)(3)), it would be better to create a system that allowed agency-by-agency *express* determinations "opt-in" in favor of database protection for information generated with substantial government funding.¹³

In the other direction, our initial conclusion is that section 104 does not provide the best solution to the problem of "capture." Section 104(2) implicitly indicates that government information integrated into a private database continues to retain its exclusion from section 102, such that third parties can copy the government information without any risk of liability to the private database producer. The Administration recognizes that this is one possible approach to the specter of government information being "captured" in private database products, but we believe that this approach may substantially reduce the incentive for the creation of value-added products using government-generated information and, thus, the "flow" of government information to the public.

⁹Office of Management and Budget Circular A-130 Revised [Section 7.b, "Basic Considerations and Assumptions"], available at: <http://www.whitehouse.gov/WH/EOP/OMB/html/circular.html>

¹⁰The U.S. Government's position on the importance of the free exchange of such data has been stated often, including in the "Bromley Statement" on climate change information. See Data Management Global Change Research Policy Statement, Office of Science and Technology Policy, The White House, July 2, 1991.

¹¹One example is government agencies that offer their unique capabilities to the private sector on a reimbursable basis. At the Department of Energy, for example, these transactions can be Cooperative Research And Development Agreements (CRADAs) which are "100% funds-in" agreements or "Work for Others" agreements or User Faculty agreements: that is, the private entity provides 100% of the operating funds for the research which is conducted at a government laboratory. We believe that these privately funded research projects could reasonably give rise to collections of information protectable under a database protection law *because* in judging the equities of the relative contributions to the final database product, there is little or no government investment. Failure to provide protection in such cases would discourage businesses from entering into these agreements. This would sharply curtail the ability of the government to enhance the competitiveness of the private sector.

¹²The pending NRC Study may provide Congress and the Administration with additional information on this issue.

¹³This is in keeping with our recommendations in relation to parallel provisions in H.R. 354. See Administration Statement on H.R. 354 at 8-9.

Federal, state, and local governments generate tremendous amounts of information. Historically, these same government agencies have not done a commensurate job disseminating the information to the public. Dissemination of government-generated data has always involved a mix of public and private resources. Through the Congressionally mandated Federal Depository Library Program, the Federal Government uses public libraries, libraries of public universities, and libraries of private institutions to make government-funded information widely available to citizens. At the same time, in hundreds of cases ranging from the court system to the U.S. Geological Survey, private entities gather raw, government-generated data and then process, verify, and repack the data to produce value-added products which are then widely disseminated.

Once there are such commercial products, any decisions to devote public resources to disseminate the raw government data further must be weighed against other demands for government resources.¹⁴ If government-generated data does not remain available to the public from government sources, there is the potential for capture of data, with one or a few private entities becoming the "sole source" for important data.

When a U.S. Government work is integrated into a private, value-added product, copyright law requires that the U.S. Government portion remain unprotected and available for copying.¹⁵ The Administration has considered whether a parallel solution to the "capture" problem with collections of information would be appropriate: requiring private entities to identify government information in their value-added products, and excluding such information from any database protection schema. The problem with this approach is that a private entity may make a considerable investment in gathering government data from disparate sources, bringing it together, and distributing it. This "value-added" would be lost—and the incentive for it destroyed—if all the data could be freely appropriated on the grounds that it is government-generated data in a private database.

While the Administration is committed to finding ways to increase public dissemination of government information and to avoid "capture" of data, we must recognize that these private entities perform a valuable service, and may invest substantial resources, in the production of data products. For this reason, the Administration has advocated that private database producers provide clear notice of the source of government data—so that users or would-be competitors may turn to the original government source—in exchange for the right to prevent wholesale misappropriation of government information embedded in the private database.¹⁶ Given the realities of dissemination of government information, we believe that this is a better means

¹⁴This same balance was expressed by Weiss and Backlund as follows: "On the one hand, this means that the Government should not try to duplicate value-added information products produced by the private sector. On the other hand, it means that the government should actively disseminate its information—particularly the raw content from which value-added products are created—at cost and not attempt to exert copyright-like controls or restrictions." Peter N. Weiss and Peter Backlund, *International Information Policy in Conflict: Open and Unrestricted Access versus Government Commercialization*, in BRIAN KAHIN AND CHARLES NESSON, EDS., *BORDERS IN CYBERSPACE* (1997), 300, 303.

¹⁵A disclaimer capturing the spirit of this requirement is that found in the U.S. INDUSTRY AND TRADE OUTLOOK (1998) published by McGraw-Hill in cooperation with the Department of Commerce. The disclaimer states: "Portions of this publication contain work prepared by officers and the employees of the United States Government as part of such person's official duties. No copyright is claimed as to any chapter or section whose designated author is an employee of the United States Government, except that copyright is claimed as to tables, graphs, maps or charts in any chapters or sections of this publication if the sole designated source is other than the United States Government."

¹⁶We have suggested that, as a condition for any database protection, a private database producer whose database includes a substantial amount of government-generated data should be required to note that fact with reasonably sufficient details about the government source of the data. By this, we mean, for example, "This database was compiled with substantial amounts of data from the National Weather Service, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D.C." but not "This database was compiled with information from the Department of Defense." In other words, the disclosure should reasonably direct the user to the government source. Defendants could be given an express defense where the database producer has included substantial amounts of government-generated information and failed to make such a disclosure. See Administration Statement on H.R. 354 at 10-11.

Such disclosures might also give government agencies a stronger incentive to maintain the raw data and keep it available to citizens, thus eliminating at least some sole source situations. Generally, we are hopeful that the digital environment and the Internet will, over time, make it possible for government agencies to provide more government-generated information at less cost through public channels. See *id.*

to transition into wider dissemination of government data by the government than the approach embodied in section 104.

Section 101(6)(B) provides that databases collected or maintained because of Federal statute or regulation would be excluded from section 102's protection. Perhaps the most powerful argument for excluding "legally required databases" from any database protection regime is that the production of these databases requires no further incentive. There is, however, an important distinction between legally required databases that must be submitted to public authorities and those whose preparation are legally required, but held privately by individuals and institutions. The Administration has not reached any conclusion on whether either kind of databases collected or maintained by requirement of law should be excluded from any database protection regime.

D. Fourth Principle— Avoid unintended consequences

Any database misappropriation regime must carefully define and describe the protected interests and prohibited activities, so as to avoid unintended consequences; legislation should not affect established contractual relationships and should apply only prospectively and with reasonable notice.

Until the introduction of H.R. 1858, advocates of database protection had proposed database protection terms of up to 25 years. Given the speed at which new products are introduced in information industries, critics have expressed the view that the 15-year or 25-year terms in other database protection proposals were unnecessarily long. The Administration currently believes that there is no single, optimal term of protection for the wide range of products subject to protection as "databases" or "collections of information."¹⁷ In order to implement the suggestion, it will be necessary to specify the acts that initiate the term of protection.

In the absence of strong indicators of the optimal term for an *ex ante* incentive structure, the Administration has expressed the view that there are virtues to a 15-year term of protection, as proposed in H.R. 354, and that the Administration would be troubled by any efforts to establish a term of protection exceeding 15 years. We do not support the basic premise of H.R. 1858—that a codification of misappropriation principles should provide an open-ended term of protection because common law misappropriation principles do not impose any fixed duration to such claims. We also believe that legislation must specify the acts that initiate the term of protection.¹⁸ The codification of these principles presents Congress with the opportunity and, in some sense, the responsibility to draw limits on when misappropriation claims should be entertained. Because any database protection law will have some impact on the dissemination of information, we think that time limits should be established, and we favor a term of protection no longer than 15 years.

Of course, there is a risk that attempts might be made to circumvent the limitations caused by fixed term of protection. Because users would be unable to differentiate between protected and unprotected data, they would consequently be chilled in their use of the unprotected data. We have suggested in the past that where the database that is the subject of a litigation is the descendant of a now unprotected database and has substantial elements in common with that unprotected database, the defendant should be able to raise, as a defense, that the most recent unprotected iteration of the database is not reasonably publicly available. In other words, if Smith Industries has been issuing the "Smith Industrial Database" annually since 1980, and then in 1999 if Smith Industries sues someone for unauthorized distribution of the "1999 Smith Industrial Database," the defendant can raise as a defense that the 1983 Smith Industrial Database is no longer reasonably publicly available. If the 1983 database is reasonably publicly available, there is no such defense.

E. Fifth Principle—Balance protection with permitted uses

Any database misappropriation regime should provide exceptions analogous to fair use principles of copyright law; in particular, any effects on non-commercial research should be de minimis.

Last summer, we expressed concern that then-H.R. 2652 lacked a balancing mechanism analogous to the fair use doctrine in copyright sufficient to address the wide range of circumstances in which information is aggregated, used, and reused; we expressed the same concern more recently in relation to H.R. 354. So it will come as

¹⁷This is similar to economists' efforts to establish the optimal term of protection for copyrighted works where, for example, copyrighted software has a much shorter product cycle than copyrighted books and films which retain significant commercial value for decades.

¹⁸For the Administration's discussion of this issue, see Administration Statement on H.R. 354 at 25-27.

no surprise that the Administration is concerned that Title I of H.R. 1858 does not have a general "permitted uses" provision analogous to fair use in copyright law.

Section 103(d) provides an exception directed at scientific, educational, and research uses. We intend to examine this provision more carefully, but initially we are concerned that this exception is both ambiguous and overbroad. We note that section 103(d) shields the activity of "duplicat[ing] the same information"; it does not shield distribution—the focus of the basic prohibition. As used in section 103(d), "duplicates" could be understood in either of two senses. First, a scientific researcher could "duplicate" a database in the sense of independently recreating the same database—but this type of activity already falls outside the basic prohibition and is further shielded by section 103(a). Second, "duplicates" could mean reproduces, as when an educator leaves a hard-bound database on a reserve shelf with instructions for his students to individually photocopy the database for use in class.

It appears that this latter type of activity could be shielded by section 103(d) because while the activity might be "in competition" with the database's sales (section 101(5)), section 103(d) requires a higher barrier that it be in "direct commercial competition." In the circumstance described, the educator might be able to orchestrate a pattern of extensive copying of a database and avoid all liability. The phrase "direct commercial competition" creates a high barrier, such that even if section 103(d) shielded "duplicates and/or distributes," it appears that an educator e-mailing a database to 100 of his students would still incur no liability—because her activities would not be in *direct commercial* competition. We note that this type of conduct could occur even without section 103(d) on the grounds that the basic prohibition requires distribution "to the public," an ambiguous phrase that could be argued to exclude a distribution limited to students in a particular class, members of a particular learned society, or all members of senior executives of a corporation. In respect to original works of authorship, these types of activities are often well beyond the scope of the fair use doctrine of copyright law. As discussed above, we believe that one of the greatest challenges in drafting database protection legislation is providing database producers with some type of protection against such *patterns* of repeated individual acts of duplication without prohibiting uses of data by individuals that should be permissible under the First Amendment.

F. Sixth Principle—Ensure protection for U.S. companies abroad and promote harmonization

Consistent with the goals of the World Trade Organization (WTO) and U.S. trade policy, legislation should aim to ensure that U.S. companies enjoy available protection for their database products in other countries on the same terms as enjoyed by nationals of those countries.

There has been some discussion in the United States about the effects of the European Union's 1996 Database Directive (EU Directive) on American database producers. The EU Directive requires European Union Member States to provide *sui generis* protection for databases, but denies this protection to nationals of any foreign country unless that country offers "comparable protection to databases produced" by EU nationals.¹⁹

The Administration opposes such "reciprocity" requirements, both domestically and internationally. We believe that commercial laws (including intellectual property and unfair business practices laws) should be administered on national treatment terms, that is, a country's domestic laws should treat a foreign national like one of the country's citizens. This principle is embodied in Article 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) as well as more generally in the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works.

The Administration believes that Congress should craft U.S. database protection legislation to meet the needs of the American economy. A database protection law properly balanced for the robust digital economy of the United States will serve as a model for other countries that hope to build businesses, employment, and economic activity in the new millennium.

At the same time, we believe that a misappropriation law along the lines of H.R. 1858 or H.R. 354 (with proper attention to the concerns we have identified with re-

¹⁹This is established in Recital 56 of the EU Directive. Recital 56 also provides that a foreign national will enjoy database protection when those "persons have their habitual residence in the territory of the Community." This may provide protection to American database producers who have substantial business operations in EU Member States. Pursuant to Article 11/3 of the EU Directive, a determination whether a foreign state offers "comparable" protection must be made by the European Council based on recommendations from the European Commission.

spect to each bill) will amply provide protection "comparable" to that provided by national laws implementing the EU Directive. From the perspective of a private database producer, the question should be whether a U.S. misappropriation law provides a cause of action and meaningful remedies in the same range of situations in which the laws implementing the EU Directive provide a cause of action and meaningful remedies.²⁰

For the reasons stated above, the Administration would oppose any effort to put automatic reciprocity provisions into American law in this area. In fact, United States Trade Representative Charlene Barshefsky cited the reciprocity provision of the EU Directive as a subject of concern in announcing the Administration's 1998 Special 301 Review. While we believe that a United States database protection law should adhere to a national treatment model, the Administration would support an appropriately crafted provision that would allow the President to affirmatively deny database protection to foreign nationals on the appropriate finding by Executive Branch agencies such as the USTR and/or the Department of Commerce. This could, for example, be achieved by statutory language or legislative history making database protection for foreign nationals subject to USTR's Special 301 process.

G. Additional Issues

1. Administration Study

Section 108 of H.R. 1858 provides that the FTC will report to the Congress on the effects of the database protection legislation not later than 36 months of the date of enactment of the legislation. While the Administration has advocated and continues to advocate the study of the effects of any database protection legislation, we believe that an interagency process would be preferable to analysis resting solely in the hands of an agency, particularly the agency being called upon to enforce the legislation. The Administration believes that such a government study should be conducted with the participation of the Department of Commerce, the Office of Science and Technology Policy, and the Department of Justice in consultation with the Register of Copyrights. These agencies have, over the past few years, devoted the most resources to the study of this issue and their expertise should be utilized.

2. The Misuse Doctrine

The Administration supports the idea that the intellectual property misuse doctrine should be extended to any database protection law, but we have not had sufficient time to study the effects of the various provisions of section 106(b). We note that these provisions appear to expand the misuse doctrine from its traditional tests (for example, subsections 106(b)(1), (3) and (6)) into relatively untested areas (for example, subsection 106(b)(4)). We believe this requires careful consideration.

I thank the Subcommittee for the opportunity to appear before you today and look forward to working with you during the legislative process. I would be pleased to answer any questions you may have at this time.

Mr. TAUZIN. Thank you.

Next is Edward Black, president and CEO of the Computer & Communications Industry Association.

STATEMENT OF EDWARD J. BLACK, PRESIDENT AND CEO, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Mr. BLACK. Mr. Chairman, Mr. Markey, members of the subcommittee, thank you for having this hearing. I want to express our support and gratitude to Chairman Bliley for introducing H.R. 1858, the Consumer Investor Access to Information Act, and to the core cosponsors, Chairman Tauzin, Mr. Oxley, Dingell, Markey, and Towns.

We have now entered the information age. The issue before us requires striking the proper balance between legislating to halt the misappropriation or theft of databases and overly broad legislative proposals that stifle creativity in commerce.

²⁰The EU Directive is not a national law. It "directs" the Member States of the EU to implement a legal framework. H.R. 1858 would have to be compared, for example, to German, Dutch, and/or Italian law to make the proper comparison of national law to national law. Such a comparison is well beyond the scope of this statement.

It is critical that Congress address the single issue that it must confront, misappropriation, and not attempt to create a broad regime of statutory protections that may well create more harm than good. We should not expand or anticipate what is at issue and open up this new electronic world to additional regulation, uncertainty, and litigation.

Databases are compilations of facts, data and information. Facts are always considered to be in the public domain. It is this basic notion that allows two distinct authors to create two databases out of the same set of facts.

The issue before the 106th Congress is the piracy, or the misappropriation, of the databases. Databases and legislation that address misappropriation, theft, or piracy are matters to be addressed under the commerce clause.

Databases are items of commerce. The same facts used to create one database may well be used to create others which address the same subject matter, or they can be used to create new databases that are different from the first. These other databases can offer additional values or benefits to the market, and can often transform the facts in such a way not contemplated by the original creator.

The basic problem with an antipiracy solution based in copyright law is that it necessarily grants the first organizer a significant marketplace advantage. Copyright-like protection would give the first organizer the right to control competition and other transformative value added or downstream uses of the information collected, as well as any worthwhile fraction of the collection.

This may be particularly unwise in the information age. The Internet makes it easier for the average person to seek and use information from any subject or discipline. This is a great development. Searching for and using information will become even easier in the future so long as we do not do harm to the exploding medium of the Internet.

Any legislation that restricts or constricts the Internet's great benefit and its growth and utility must meet, we think, a heavy burden of necessity; and further, it should not run afoul of the law of unintended consequences. The Web is an evolving medium, and its growth can best be assured with as little government regulation as possible.

CCIA and its members have strongly resisted unnecessary government regulation of the Internet. As a general rule, we believe that the Internet will work best through self-regulation and agreements reached voluntarily among those that build and use it. Although people who create a work used by others understandably want to benefit financially and recoup their investment, we cannot support proposals that would confer huge market control to one party simply because it was the first to publish.

The bill before you today adequately addresses the problem without conferring control of facts and information to an individual which should properly reside in the public forum. It does not restrict use of data compiled in database form from being used in a second database. It avoids establishing a new regime of onerous Federal regulation.

With the adoption of the first amendment over 200 years ago, we have operated as a Nation that values the free flow of facts and information. Now with the Internet just a few years old, with information more available than ever, we should promote in every way possible, not restrict, the flow of facts and data in the information age. Mr. Chairman, thank you again for the opportunity to testify today.

[The prepared statement of Edward J. Black follows:]

PREPARED STATEMENT OF EDWARD J. BLACK, PRESIDENT AND CHIEF EXECUTIVE
OFFICER, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Chairman Tauzin, Ranking Democrat Markey, and members of the Subcommittee, I am Ed Black, President of the Computer and Communications Industry Association. CCIA is made up of small, medium and large companies that market and sell computer equipment, software, communications and network equipment, telecommunications and on-line services, re-sellers, system integrators and others in related business ventures. Our member companies employ well over half-million workers and generate annual revenues in excess of \$300 billion. Established over 25 years ago, we are committed to "*Open Markets, Open Systems, Open Networks and Full, Fair and Open Competition.*" Thank you for inviting me to testify today and more importantly thank you for holding this hearing on the critical issue of database protection.

Let me begin by expressing our support and gratitude to Chairman Bliley for introducing H.R. 1858, the Consumer and Investor Access to Information Act of 1999 and to his original cosponsors, Chairmen Tauzin, Oxley and Ranking Democrats Dingell, Markey and Towns as well as all of the other members of the House who have expressed support for this legislation.

We have now entered the "Information Age" and we are faced with the issue of striking the proper balance between legislating to halt the misappropriation or theft of databases and overly broad legislative proposals that stifle creativity and commerce. The fact is that we do not adequately know what impact legislation on database development, enacted today will have in the future. Therefore, it is critical that Congress address the single issue that it must confront—misappropriation—and not attempt to create a broad regime of statutory protections that may well create more harm than good. If there is a single guiding principle I could pass to you—the members of the Commerce Committee—it is that any legislation on this subject should address the discreet issue in controversy, address thoroughly, but we should not expand or anticipate what is at issue and open up this new electronic world to additional regulation, uncertainty and litigation.

Please keep in mind that databases are compilations of facts and information. The ability of databases to find a place or niche in our economy is based on the method of organization and the demand for the underlying information. The bill you are currently considering and other legislative proposals are attempts to strike the proper balance between pirating another's work and promoting competition.

COMMERCE CLAUSE V. COPYRIGHT:

To the extent the issue before the 106th Congress is piracy or the misappropriation of databases, this is not a matter to be solved in Copyright Law. It seems clear that the ability to obtain a copyright for a database is controlled by the Feist decision.¹ In that decision, the Supreme Court held that the Copyright Clause² of the Constitution protects only original works of authorship and does not allow for protection of factual information or data. In determining originality the Court required that (1) the author originally created the work and (2) that it contain a minimal degree of creativity.³ While it is important to remember that this is the state of current copyright law today, as it applies to databases, it does not mean that databases cannot obtain copyright protections.

Yet while copyright protects the originality or expressive element of databases, it does not protect the underlying facts used to create the database. Facts are always considered to be in the public domain. It is this basic notion which allows two distinct authors to create two databases out of the same set of facts. This does not permit the second author to copy the first's compilation and sell it in commerce. It also

¹ *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1985)

² U.S. Const. art. I, Sec. 8, cl. 8.

³ *Feist*, 499 U.S. at 345.

does not allow the original author to lock-up the underlying facts used in his/her compilation so that no other compilation could be created and compete for acceptance in commerce.

It is for this very reason that we should recognize that databases and legislation that addresses misappropriation, theft or piracy are matters to be addressed under the Commerce Clause. Databases are items of commerce and the same facts used to create one database may well be used to create additional ones addressing the same subject matter. However, it may be just as likely that these same facts would be used to create new databases that are different from the first, that offer additional values or benefits in a market or that transform the facts in such a way not contemplated by the original creator. The ability to take the same facts and make a new "product" is basic to the creation and flow of commerce. To the extent that legislation is needed, it must allow for two similar databases to compete as well as to take the underlying information or facts and create new databases the marketplace to determine the "winner."

The basic problem with an anti-piracy solution based in copyright law is that it necessarily grants the first author a significant marketplace advantage. Any other party seeking to offer a competing database in commerce would almost certainly have to obtain a license from the original author. That gives the first party the right to control competition *and* other transformative, value-added or downstream uses of the information collected as well as any worthwhile fraction of the collection. The effects on commerce are readily apparent where one party can pick and choose whether anyone would compete with them.

IMPACT ON THE INTERNET:

This problem is especially acute in the information age. The World Wide Web creates and publishes information in the blink of an eye. It takes facts, owned by the public, and places them in a variety of files, uses, compilations or databases for presentation to the consumer.

Some of these compilations are derivative of another's work; some may take the same facts and develop an entirely new product. But we all must agree that it has never been easier for the average person to seek and use information from any subject or discipline for almost any use than it is now. We can be assured that the search and use of information will become even easier in the future, so long as we do not do harm to the exploding medium of the Internet. The growth of the web, the amount of information it has currently, how much is being added at any given time and how that information is being used may not be quantifiable with any degree of certainty. We do know that the web will become an increasingly significant tool for commerce, education and research. Hence, any legislation that restricts or constricts its growth and utility must be placed under heavy scrutiny. Furthermore, this same legislation should be crafted so that it addresses the problem at hand and does not run afoul of the law of unintended consequences. The web in an evolving medium and its growth can best be assured with as little government regulation as possible. Given the choice between a proposal that confers control for a period of time and over a myriad of uses for facts and information in the public domain. Or a proposal that simply addresses the threat of "parasitic" conduct by competitors that infringes on rights that exist in contracts or Copyright law today; we should choose the narrower approach. H.R. 1858 accords the necessary protections to ensure vigorous and robust competition in databases, protects the creation of new compilations or databases and appears to do little harm to the growth and promise of the world wide web.

CCIA and its members have strongly resisted government regulation of the Internet. As a general rule, we believe that the Internet will work best through self-regulation and agreements reached voluntarily among those that build and use it. However, we must address a problem which goes to the ability of providers and users to employ the Internet to its fullest. No one can support piracy or the gross misappropriation of another's work. People who create a work used by others understandably want to benefit financially and to recoup their investment. However, we cannot support proposals that would confer time periods and market control to a one party simply because they were the first to publish. Chairman Bliley's bill accomplishes the three goals of penalizing those who pirate another's work, allowing those who create to realize a benefit from their work and avoiding control of currently developed markets as well as those to come "downstream." All of this is accomplished without the crushing burden of federal regulation of the Internet. It preserves the promise and the potential of the Information Age.

THE EXTENT OF DATABASE PROTECTION:

As I mentioned earlier, databases are compilations of facts and information, these underlying components are in the public domain and are generally available for any party to employ or exploit. The use of facts are essential to the transfer of knowledge from one to another. Hence, a second-generation publisher has always been allowed to extract facts from a variety of sources, including existing compilations for the purpose of creating a new compilation. While the organization of facts and information into databases has become a highly critical issue because of the development of the Internet and the explosion of information sources online, we need to understand that both the original creator of a compilation and those who produce a compilation later can co-exist.

Furthermore, the person who first compiled facts into a compilation has recourse if it is determined that someone has pirated the work. The original creator of the compilation or database has protection under our Copyright law. Even with the Feist decision regarding "sweat of the brow" copyrights, compilations that demonstrate a level of originality are still protected. Additionally, contract law, where licensing agreements are used to protect against further dissemination, can protect the compilation. This is a common tool for on-line databases.

Third, there is the tort of misappropriation, which was recently reviewed by the U.S. Court of Appeals for the Second Circuit.⁴ In this case, the National Basketball Association (NBA) claimed that the delivery of sports scores to fans through paging devices was a misappropriation of its rights in its basketball games. The defendant demonstrated that it gathered information from reporters who keyed appropriate information into personal computers. Finding no information proprietary to the NBA was taken and the NBA was not in the pager sports score business, the court concluded there was no harm done to the NBA and found for the defendant. Nevertheless, the tort of misappropriation is a viable cause of action where the facts match the criteria as enumerated in the NBA case. Finally, on-line databases can be protected by technological means, as you may recall the Digital Millennium Copyright Act (DMCA) prohibits the manufacture and sale of devices that can circumvent technological protection measures.

Therefore, despite the Feist decision, judicial remedies exist to protect a compiler's creative work. It is also important to recognize that since Feist, the number of published databases continued to increase, as did their size. In the years immediately following Feist, the current proponents of extensive database protections did not lobby the Congress seeking protection. The "database" industry is healthy and growing.

It was only when the European Commission (EC) adopted (in 1996) a database directive that prohibited extraction of a substantial part of another database did certain groups and interests lobby the Congress for legislation. The purpose of the EC directive was to foster development of databases in Europe to compete with those developed in the United States. While the directive caused a great deal of concern, there have always been ways to address the problem without further legislation. First, any U.S. publisher would have its works protected if it located a subsidiary in Europe. Second, the appropriate forum for seeking relief from the EU directive is before the World Trade Organization (WTO). It should be noted that since the 1996 adoption of the EU directive, there has been very little evidence of significant harm to the U.S. database interests.

While there may be a suitable rationale for bolstering defenses against the piracy of databases, there is no evidence to support proposals that confer significant marketplace advantages to one database publisher over another.

SPECIFICS OF H.R. 1858:

As I will discuss in this section, the Bliley bill provides a clear line between database piracy and creating a new database. In that regard it promotes certainty, a willingness to invest and avoids litigation in which similar fact patterns could result in dissimilar decisions.

In Title I of the bill, a duplicate of a database is one that is "substantially the same," therefore minor changes for the purpose of avoiding the penalties of this bill will not save the creator of the second database. The second database need not be identical to trigger action by the Federal Trade Commission (FTC). Additionally, the bill recognizes that within one database, other databases may well exist and therefore, pirating only a section of a larger database is again likely to trigger FTC action. In order for liability to attach, there must be competition between the two

⁴*National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

databases as defined in the bill; first a substantial displacement or loss of sales and second, a significant threat to the creator of the first database to recover a return on the investment made in creating the first database.

This title does not create a new private right of action; rather actions currently permissible under contract, trademark, copyright, state common law on misappropriation remain available to the injured party. The bill does grant to the FTC the right to bring a cause of action to protect against database piracy.

Title II of the bill covers the discreet issue of information concerning the buying and selling of securities, such as real time stock quotes. It permits market information processors to require those who use their services to obtain permission before disseminating that information. It also protects those who gather the same information independently to disseminate that information without seeking permission.

Let me touch on other beneficial aspects of the Bliley bill.

- It generally prohibits online service provider liability. Assuming the online service provider did not place the duplicate database on its system, the OSP cannot be held liable under H.R. 1858.
- It does not create a time period of protection during which other and different databases using the same facts and information could not be created. This promotes continued investment in database creation and ensures that no party has the ability to "lock-up" facts and information from the public.
- The Bliley bill only protects those databases created after enactment. It correctly recognizes that there is no need to provide an incentive to create something that already exists.

For these reasons, we urge the Subcommittee to report H.R. 1858 favorably and in the near future.

CONCLUSION:

Mr. Chairman, we recognize that the members of the Commerce Committee are confronted with a difficult decision. In addition to the inter-committee dispute over jurisdiction, you will no doubt hear from those who feel that the Bliley bill fails to address the issue of piracy or misappropriation of databases. The fact of the matter is that the bill before you today adequately addresses the problem without conferring control of facts and information to an individual when it should properly reside in the public forum. It also avoids restricting the use of data compiled in one fashion from being compiled and used in another. This is an issue best left to the marketplace, allowing the consuming public to make the final determination.

Finally, this bill does not stray so far afield that it invites consequences not adequately thought out. While it effectively addresses and bolsters the defenses against database piracy, it does not seriously hamper the flow of information and facts over the Internet, nor does it constrict the development of new databases that will become available on-line. The greatest danger that prompted CCIA to become involved in this dispute was the threat legislation that attempted to do too much would endanger the growth and development of the Internet. To the credit of Chairman Bliley and his cosponsors, H.R. 1858 strikes an appropriate balance and therefore encourages our continued movement into the information age with little government regulation of the Internet.

Mr. Chairman thank you again for the opportunity to provide our views on this legislation.

Mr. TAUZIN. Thank you, very much, Mr. Black.

The Chair would now like to recognize Mr. Frank Politano, trademark and copyright counsel for AT&T.

STATEMENT OF FRANK POLITANO, TRADEMARK AND COPYRIGHT COUNSEL, AT&T CORPORATION

Mr. POLITANO. Thank you, Chairman Tauzin. I am also an adjunct professor of law at Seton Hall University School of Law in New Jersey, where I teach intellectual property law and I practiced in the field of intellectual property law for 25 years. I want to thank you all for this opportunity to testify on behalf of AT&T regarding the Consumer and Investor Access to Information Act of 1999.

My testimony will describe AT&T's views on what we consider very important legislation. As you probably know, AT&T is among

the world's communications leaders providing voice, data, and video telecommunication services to large and small businesses, consumers and government agencies.

AT&T also provides domestic, international, local, and Internet communication transmission services and cellular telephone and other wireless services. We also now supply cable transmission and distribution services throughout the United States.

AT&T has had a long heritage of applying innovation to develop and deliver communications services reliably; and it is this tradition of innovation that has enabled us to provide sophisticated services around the world to stay ahead of our competitors.

You may be wondering why we are here today to testify about database protection. We do not market databases for commercial use. The reality, however, is that we depend upon and use extensively databases throughout our business, and in order to be successful we must use that information.

As has been just testified to, mastery of information is accelerating the development of a new digital economy. Advanced information technologies enable AT&T to gather, analyze, and react to market data more efficiently and furnish telecommunication services to satisfy our customers.

I want to emphasize that at AT&T we rely heavily on databases of factual information in virtually every aspect of our business, and that is outlined in my written testimony. I won't get into all of the different ways that we use databases in my oral comments.

I also want to emphasize that our scientists at AT&T laboratories use factual data from many sources to perform research. Research is vital to AT&T. Many people may not realize this, but our AT&T laboratories files one patent per day in the U.S. Patent and Trademark Office. And after checking with our scientists, I can tell the committee that factual information and databases are very important to practically everyone of those patents.

We therefore feel strongly that a new law focused on database piracy must be very carefully crafted to address concerns of over-protection without unreasonably restricting innovation, and particularly the law must allow for downstream transformative uses of information such as the ones I have described and are in my written comments.

We believe H.R. 1858 protects that necessary balance between preserving protection in the database community and promoting the growth of databases and innovation generally.

By protecting only against untransformed duplication for public commercial exploitation, this bill affords protection for the entire database or for a discrete section of the database, but recognizes the unquestionable need for transformative uses.

We also think that the legislation has an important safety valve by recognizing the concept of database misuse, and we think that it addresses important issues which allow for Internet communications and communications under the telecommunications act.

We believe that the legislation is well balanced, and we appreciate the continued leadership of Chairman Bliley on telecommunications and technologies matters and we applaud the introduction of this bill. We want to particularly thank Chairman Tauzin and the members of this subcommittee for holding this hearing, and we

look forward to working with each of you to help enact this legislation.

I offer AT&T's assistance to the committee as well as my own and I would be glad to answer any questions you may have.

[The prepared statement of Frank Politano follows:]

PREPARED STATEMENT OF FRANK POLITANO, GENERAL ATTORNEY AND TRADEMARK AND COPYRIGHT COUNSEL, AT&T

My name is Frank Politano, and I am a General Attorney and Trademark and Copyright Counsel for AT&T. I am also an Adjunct Professor of Law at Seton Hall University School of Law in Newark, N.J. where I teach intellectual property law. I have practiced in the field of intellectual property law for 25 years. Thank you for this opportunity to testify on behalf of AT&T regarding the Consumer and Investor Access to Information Act of 1999.

My testimony will describe AT&T's views on this very important legislation. AT&T is among the world's communications leaders, providing voice, data and video telecommunications services to large and small businesses, consumers and government agencies. AT&T provides domestic, international, local and Internet communication transmission services, and cellular telephone and other wireless services. We also supply cable transmission and distribution services.

AT&T has a long heritage of applying innovation to develop and deliver communications services reliably and it is this tradition of innovation that has enabled us to provide sophisticated services around the world to stay ahead of our competitors. AT&T Laboratories is one of the premiere technology research facilities in the world and out of our laboratories come at least one new patent filing per day, helping to keep the United States competitive and at the frontier of telecommunications and Internet services.

You may be wondering why AT&T is here today to testify about database protection. While we do not market databases for commercial use, the reality today is that we all depend on the efficient use and management of information to be successful. Mastery of information is accelerating the development of a new, digital economy. Advanced information technologies have enabled AT&T to gather, analyze and react to market data more efficiently. Furnishing telecommunications services with the speed that satisfies customers requires efficient internal systems. At AT&T, we rely heavily on databases of factual information in virtually every facet of our business.

AT&T uses data from many sources throughout our business activities, including marketing and sales, credit, collections, billing and customer service. We use geographical and statistical market information and demographic data, and we often combine this information with compilations of factual information about existing and new customers that we obtain from outside suppliers such as Dun & Bradstreet. We use large volumes of data and factual information to develop innovative new products and services. Because no single source can meet all of our needs for data, we routinely combine pieces of information we receive from one source with pieces of information from other sources, and with data contained within our own business operations. We then create "customized" databases such as targeted marketing lists containing the piece parts of other databases that meet our specific business needs.

A key component of AT&T's overall mission is the important contributions that are made by AT&T Laboratories. Our scientists also use factual data from many sources for research in a variety of areas.

We therefore feel strongly that a new law focused on database piracy must be carefully crafted to address that important concern without unreasonably restricting innovation, and particularly which allows for and in fact encourages downstream "transformative" uses of information such as the ones I've described. The Consumer and Investor Access to Information Act does exactly that. H.R. 1858 protects the necessary balance between preserving protection for the database community and promoting the growth of databases and innovation generally. By protecting only against untransformed duplication for public commercial exploitation, this bill affords protection for an entire database or for a discrete section of a database but recognizes the unquestionable need for transformative uses. Thus, while the bill would protect against the narrow perceived gap in the law relating to systematic, unauthorized commercial copying of databases, it does not afford protection against productive, socially useful purposes that transform rather than supercede the original. Significantly, this bill will not have a chilling effect on innovation and scientific development.

H.R. 1858 also features an important "safety valve" by recognizing, in Section 106(b), the concept of database misuse, and setting forth six, non-exclusive examples a court should consider in determining misuse.

Another important feature of H.R. 1858 is that it recognizes and maintains the many other forms of database protection that currently exist while protecting against clearly defined direct misappropriation.

H.R. 1858 also contains three important provisions that are particularly vital to the development of a robust, competitive digital economy.

The first is the very important provision that addresses databases related to Internet communications. The Internet is in fact a network of databases, and information is made accessible through tables of routers and a standardized system of IP addressing that enables the Internet to work. If the original compilers of those "databases" exerted monopoly control over, or prohibited, downstream uses of the information compiled in those databases, the future operation of the Internet would be threatened. As an aside, we do believe that it is important to make clear that all databases associated with the operation of the Internet, including those related to the registration of Internet domain names, are exempted from protection under this bill. This important clarification will further strengthen the bill.

A second, vital provision exempts activities under the Telecommunications Act from the scope of protection offered by the bill. A primary purpose of the Telecommunications Act is to open the local bottleneck to competition, and one necessary precursor to that goal is that the incumbent local telephone companies must provide access to its many databases of information, such as directory assistance databases and call switching databases, to new local carriers on nondiscriminatory terms and conditions. Conceivably, if the original compilers of those databases (the local incumbents) were to receive a new statutory right in those databases, it could be even harder for new entrants such as AT&T to get reasonable access to those systems.

Lastly, H.R. 1858 makes it clear that online service providers that do not initially place duplicate databases in their networks will not be liable under the statute. This provision ensures that those who are building and managing digital networks are not deterred by the threat of potential liability for the actions of others.

We do suggest that the legislative history make it clear that the expression "substantially the same" in the definition of "duplicate of a database" does not mean "substantial similarity" used in copyright law as the test for copyright infringement. H.R. 1858 is designed to protect against untransformative duplication that extracts the bulk of facts from a database. Substantial similarity has a different meaning: it refers to a defendant's having access to an original work of authorship and the consequent improper appropriation of the expressive elements of that work. The substantial similarity test has been used to find infringement where the defendant has taken only a few notes or a few lines of plaintiff's work—clearly not the result intended by this legislation. This clarification should avoid confusion and ambiguity by ensuring that a copyright law concept is not applied to this statute, which is a law designed to protect against unfair competition.

AT&T appreciates the continued leadership of Chairman Bliley on telecommunications and technology matters and applauds the introduction of H.R. 1858. We want to particularly thank Chairman Tauzin and the Members of this Subcommittee for holding a hearing on this important issue, and we look forward to working with each of you to help enact this legislation. I offer AT&T's assistance to the Committee as well as my own, and I would be glad to answer any questions you may have.

Mr. TAUZIN. Thank you, very much, Mr. Politano.

I think this is the first time Yahoo! has ever appeared before a congressional committee. Our next witness is Mr. Matthew Rightmire, director of business development.

STATEMENT OF MATTHEW RIGHTMIRE, DIRECTOR OF BUSINESS DEVELOPMENT, YAHOO! INC.

Mr. RIGHTMIRE. Chairman Tauzin, members of the subcommittee, I am Matt Rightmire, director of business development at Yahoo!. Thank you for the opportunity to appear today on an issue that is close to our hearts but also those of our competitors in our space, Lycos and ADVO and Excite, two other major Internet portals are pleased to associate themselves with this testimony.

Yahoo! is a global Internet media company that offers a branded network of comprehensive information, communication and shopping services to more than 60 million users worldwide each month. As the first online navigational guide to the Web, Yahoo! is the leading guide in terms of traffic, advertising, household and business user reach, and is one of the most recognized brands associated with the Internet.

The information technology economy, which has been a major contributor to the U.S. economy recently, is based on the broad availability and flow of information. It has developed in large measure because of the favorable environment created by our Nation's historical information policy—that no one may own the facts or information.

As the Supreme Court said in *Feist v. Rural Telephone Service Company*, all facts, scientific, historical, biographical, and news of the day, are part of the public domain available to every person.

The process of restricting the availability of information in the information age is a cause of concern to anyone interested in the future of the Internet. We could have the most powerful computers, the most sophisticated search engines, and fully operational broad band, but none of it will mean a thing if there is not information to flow through those pipes.

Yahoo! is somewhat uniquely positioned to comment on this issue. We have spent and continue to spend a great deal of effort developing our own databases. At the same time, we aggregate and disseminate large amounts of information from other sources. In our view, legislating on the availability of information is not unlike two porcupines making love: it has to be done very carefully. And in both cases, there are significant unintended consequences which have to be avoided.

We support the targeted approach of H.R. 1858 introduced by Chairman Bliley, Tauzin, Oxley, and ranking members Dingell Markey and Towns. It is balanced and measured, and we appreciate the thought and effort that went into crafting this compromise.

I mentioned the potential for unintended consequences in legislating on this issue. Any type of information that is currently provided on the Internet could be jeopardized by an overly broad statute or one that does not adequately define critical terms.

For example, as was reported in the Washington Post on June 5, the New York Times is challenging Amazon.com's use of the Times best seller list. The best seller list is by definition a database since it lists those books of which the most copies have been sold.

While Amazon.com uses the list in its entirety, it is doubtful that it is competing with the Times. It is also doubtful that someone would not buy the Times just because the best seller list happens to be available on Amazon.com. To the contrary, Amazon.com's publication of the list is an effective advertisement for the Times that probably works to its benefit.

The Internet has become known as a rich source of information for price-conscious consumers. For example, it may provide a service to consumers by disseminating lists of the lowest air fares to various locations around the world. These listings are often compiled from a variety of sources.

Notwithstanding that a handful of facts are collected from each of several sources, and notwithstanding that the new listing is more comprehensive than any set of facts on which it is based, this collection of lower air fares could be considered a misappropriation if the statutory language sweeps too broadly. The effect of such uncertainty would be to chill the collecting and providing of such information to consumers.

Even a reasonable-use provision comparable to fair use under copyright law would not compensate for lack of clarity in the definitions. It would require years of judicial interpretation in order for those who develop transformative uses of data to understand what we could and could not do.

The aggregating and dissemination of as many different types of information as we can imagine would be subject to the same chilling effect. Those who compile and analyze stock information, restaurant and hotel rates, sports statistics, listings of concert schedules from across the country, could be dissuaded from continuing to provide this valuable information.

One of the wonders of the Internet is making available to the average person a lot of information in a short time. Parents of a 10-year-old child who has been diagnosed with a serious disease may want to obtain as much information as possible about the disease and quickly. If someone has collected information from this particular disease from a variety of sources, including a voluminous directory of all diseases, should this constitute a misappropriation?

Should a collection of information regarding hospitals that specialize in that disease be denied to those parents because it involves taking important information from each of several sources?

Mr. Chairman, this is directly antithetical to the constitutional purpose of copyright, law which is to promote the progress of science and useful arts.

Another strength of our medium is the development of new enterprises, creative ideas, and fresh approaches to difficult problems is limited only by our imagination. Do you want the availability of facts or information on the Internet to depend on a detailed legal review to require every Web site that aggregates information to have its own general counsel.

As a creator of databases, we appreciate the need for protection. One of Yahoo!'s most important assets is our Internet directory, which has required significant resources to assemble.

H.R. 1858 offers protection against those who would lift someone else's database, but this is not the only protection available. Existing copyright law gives database publishers significant protection. In addition to copyright, database publishers can rely on numerous other forms of protection including trademark, trade secret, contract, State common law, and technical protection.

One final point. H.R. 1858 has a critical provision which protects Yahoo! and certain other search engines against liability for linking to or listing categories of data. Absent such a provision, Yahoo! and others could be liable simply for acting like a card catalog of facts and information available on the Internet.

If you have any questions that you would like to ask, I will be available for questions.

[The prepared statement of Matthew Rightmire follows:]

PREPARED STATEMENT OF MATTHEW RIGHTMIRE, DIRECTOR OF BUSINESS
DEVELOPMENT, YAHOO! INC.

Chairman Tauzin, Ranking Member Markey, and Members of the Subcommittee, I am Matt Rightmire, Director of Business Development for Yahoo! Inc. Thank you for the opportunity to appear before you today on a subject very close to our hearts.

Yahoo! is a global Internet media company that offers a branded network of comprehensive information, communication and shopping services to 60 million users worldwide. As the first online navigational guide to the Web, Yahoo! is the leading guide in terms of traffic, advertising, household and business user reach, and is one of the most recognized brands associated with the Internet.

The information technology economy, which has been a major contributor to the U.S. economy, is based on the broad availability and flow of information. It has developed in large measure because of the favorable environment created by our nation's historical information policy—that no one may own facts or information. As the Supreme Court said in *Feist v. Rural Telephone Service Co.* "all facts—scientific, historical, biographical and news of the day... are part of the public domain available to every person.

The prospect of restricting the availability of information in the Information Age is a cause for concern to anyone interested in the future of the Internet. We could have the most powerful computers, the most sophisticated search engines, and a fully operative broadband system, but none of it will mean much without the information to flow over those lines.

Yahoo! is somewhat uniquely positioned to comment on this issue. We have spent and continue to spend a great deal of effort developing our own databases. At the same time, we aggregate and disseminate large amounts of information. In our view, legislating on the availability of information is not unlike two porcupines making love: it must be done very carefully. And, in both cases, there are significant unintended consequences which must be avoided.

We support the targeted approach in H.R. 1858 introduced by Chairmen Bliley, Tauzin, and Oxley and Ranking Members Dingell, Markey and Towns. It is balanced and measured and we appreciate the thought and effort that went into crafting this compromise.

I mentioned the potential for unintended consequences in legislating on this issue. Any type of information that is currently provided on the Internet could be jeopardized by an overly broad statute or one that does not adequately define critical terms.

For example, as was reported in *The Washington Post* on June 5, 1999, *The New York Times* is challenging Amazon.com's use of the *Times*' bestseller list. The bestseller list is, by definition, a database since it lists those books of which the most copies have been sold. While Amazon.com uses the list in its entirety, it is doubtful that it is competing with the *Times*. It is also doubtful that someone would not buy the *Times* just because the bestseller list was published on Amazon.com. To the contrary, Amazon's publication of the list is an effective advertisement for the *Times* that probably works to its benefit.

The Internet has become known as a rich source of information for price conscious consumers. For example, it may provide a service to consumers by disseminating lists of the lowest airfares to various locations around the world. These listings are often compiled from a variety of sources. Notwithstanding that a handful of facts are collected from each of several sources, and notwithstanding that the new listing is more comprehensive than any set of facts on which it is based, this collection of low airfares could be considered a misappropriation if the statutory language sweeps too broadly.

The effect of such uncertainty would be to chill the collecting and providing of this information to consumers. Even a reasonable use provision comparable to fair use under copyright law would not compensate for lack of clarity in definitions. It would require years of judicial interpretation in order for those who develop transformative uses of data to understand what we could and could not do.

The aggregation and dissemination of as many different types of information as we can imagine would be subject to the same chilling effect. Those who compile and analyze stock information, restaurant and hotel rates, sports statistics, listings of concert schedules from across the country, the cost of a wide variety of consumer items and pertinent statistics about universities around the world could well be dissuaded from continuing to provide this valuable information to consumers.

One of the wonders of the Internet is making available to the average person a lot of information in a short time. Parents of a 10 year old child who has been diagnosed with a serious disease may want to obtain as much information as possible about the disease, and quickly. If someone has collected information about this particular disease from a variety of sources, including a voluminous directory of all dis-

eases, should this constitute a misappropriation? Should a collection of information regarding hospitals that specialize in that disease be denied to those parents because it involves taking important information from each of several sources? Mr. Chairman, do we want to require the individual creating these transformative uses to start the research at ground zero or otherwise be relegated to a pay per fact system? This would be directly antithetical to the Constitutional purpose of copyright law which is "to promote the progress of science and useful arts."

Another strength of our medium is that the development of new enterprises, creative ideas, and fresh approaches to difficult problems is limited only by our imagination. Do we want the availability of facts or information on the Internet to depend on a detailed legal review and to require every web site that aggregates information to have its own general counsel?

Let me make clear that in virtually every case in which Yahoo! places a database on the Internet, we license the information from the originator or from one who has developed transformative uses of the data. For example, Yahoo! gets information from Sports Ticker, which is owned by ABC/ESPN which in turn collects the information from a variety of sources. If legislation were to create in effect, a statutory monopoly on facts, then these sources of information might dry up or would only be available at monopoly prices. That could, just to pick one example, make it impossible for Yahoo! to provide an analysis of LSU football to those who might be interested but find themselves far from their home state more often than they would like. As a creator of databases, we appreciate the need for protection. One of Yahoo!'s most important assets is our Internet directory, which has required significant resources to assemble. H.R. 1858 offers protection against those who would lift someone else's database. But this is not the only protection available. Existing copyright law gives database publishers significant protection. In addition to copyright, database publishers can rely on numerous other forms of protection, including trademark, trade secret, contract, state common law misappropriation, and technological protection.

One final point. H.R. 1858 has a critical provision which protects Yahoo! and other search engines against liability for linking to or listing categories of data. Absent such a provision, Yahoo! and others could be liable simply for acting like a card catalogue for facts and information available on the Internet.

Mr. Chairman, Ranking Member Markey and Members of the Subcommittee, this concludes my prepared testimony. I would be happy to answer any questions that you might have.

Mr. TAUZIN. Thank you.

The Chair is pleased to recognize Henry Horbaczewski, vice president and general counsel of Reed Elsevier, Inc., located in Massachusetts.

STATEMENT OF HENRY HORBACZEWSKI, VICE PRESIDENT AND GENERAL COUNSEL, REED ELSEVIER INC.

Mr. HORBACZEWSKI. Thank you for giving me this opportunity to testify today. I am the general counsel of Reed Elsevier, Inc. And I am testifying on behalf of the Coalition Against Database Piracy, an organization of many large and small database makers to which we belong.

My company produces many databases, including Lexis/Nexis, the Congressional Information Service, books in print and industrial databases for the construction, manufacturing, entertainment, oil, gas and petrochemical industries. So we feel that we do have some experience in this field.

I first of all would like to thank the subcommittee for recognizing the importance of protecting databases against misappropriation. The boom in telecommunications and computers has been largely driven by the demand for easier and faster access to retrievable information, in other words databases; and a law which does not protect databases or the database creation process threatens the information economy itself.

I have submitted written testimony which outlines how regrettably, we believe, H.R. 1858 does not protect the database production process in some threshold ways. But I thought in the short time available, it would be better if I illustrated my concerns with specific examples.

For example, one of our subsidiaries, MDL, a relatively small company which spends millions of dollars to produce several biochemical databases that allow both commercial and academic chemists to identify and electronically manipulate molecular structures, MDL only has several hundred employees, but they are quality jobs.

They have many, many Ph.D.s. Its commercial customers are large pharmaceutical companies that use the databases for new drug research and development. They pay license fees established by market forces which are not insubstantial, providing MDL with a revenue needed for investment to maintain its databases and create new ones.

But MDL also licenses these databases to academic chemists. The difference is that the not-for-profit users are charged a differential fee structure, which is less than one-tenth of what we charge our commercial customers. This greatly reduced price is only possible because we legitimately restrict the ability of our academic customers to use the databases for commercial purposes.

Under H.R. 1858, we believe that this would change. Let's assume, for example, a pirate took 50,000 of the approximately 70,000 bioactivity datasets in one of our databases and then added several thousand databases from another source. The resulting database would probably not be a duplicate as defined by the bill and therefore the taking would not violate it.

In addition, we would no longer be able to give academic institutions a reduced license fee for limited rights without running afoul of the misuse definition in the bill. We would have no recourse to prevent one of our giant commercial customers from taking a single copy, even lawfully acquired, and making it available over the Internet to hundreds of thousands, even if its research scientists—because this would not be a public distribution which is the only kind the bill prohibits.

In fact, the purpose would be research and the company could use our databases without any restrictions or payment to us, even though the research was commercial and it was intended to make money for the customer.

And finally, even though the piracy met the narrow standards of the bill, MDL could not sue to obtain an injunction to stop the bleeding, nor could it sue to get compensation for its lost profits.

Instead it would have to depend on the FTC, which as Mr. Pincus has pointed out, has limited resources and a different mission to cure consumer fraud and antitrust violations, to see whether they chose to investigate and prosecute, which I understand is a 3 or 4 year process.

Even then, the best we could realistically expect would be a consent decree in which the pirate promised never to do it again, and we would receive nothing. Also it is significant that the bill would not help U.S. database makers internationally. We do not believe that H.R. 1858 is comparable to the European Union directive on

database protection; and, therefore, American database producers would still be open to illegal expropriation by their European competitors and customers unless they are willing to locate part of their database operations in Europe.

Now, there was a bill which would have protected U.S. databases which passed the House largely without opposition twice in the last Congress, and we would like to thank you, Mr. Chairman and members of the subcommittee, for making that possible.

We believe that that bill, while it required further refinement to reflect users' concerns, did reflect more than 3 years of hearings and discussions and did balance users' and producers' needs, and did substantially address administration concerns and satisfy the European Union directive.

Also we believe it was based on sound economic principles. We had an economic analysis conducted of last year's bill that concluded that it not only preserved economic incentives for database development but also guarantees access to users at competitive prices.

While we urge the subcommittee to act quickly on this issue, we hope that you would build on the progress that has already been achieved. Thank you for your attention.

[The prepared statement of Henry Horbaczewski follows:]

PREPARED STATEMENT OF HENRY HORBACZEWSKI, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, REED ELSEVIER, INC., ON BEHALF OF THE COALITION AGAINST DATABASE PIRACY

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Henry Horbaczewski, Senior Vice President and General Counsel for Reed Elsevier Inc. I am submitting this statement on behalf of the Coalition Against Database Piracy ("CADP") of which Reed Elsevier is a member. Mr. Chairman, CADP welcomes the opportunity to share with the Subcommittee its views on Title I of H.R. 1858, the *Consumer and Investor Access to Information Act of 1999*. We will explain briefly why Title I fails both to provide the incentive needed to encourage database producers to create and disseminate their databases to the public and to create the protection needed to shield database producers from piracy, particularly in a digital world. We will also explain why Title I falls far short of the "comparability" requirement in the European Union ("EU") Database Directive, thereby leaving U.S. database companies vulnerable to piracy abroad and putting U.S. database producers at a distinct competitive disadvantage to their counterparts in the EU.

CADP is an ad hoc group composed of small and large U.S. database producers who have joined together to secure enactment of effective and balanced federal database protection legislation. CADP's members include the American Medical Association; The McGraw-Hill Companies; the National Association of Securities Dealers; the Newsletter Publishers Association; the Newspaper Association of America; the New York Stock Exchange; Phillips Publishing International, Inc.; Reed Elsevier Inc.; Silver Platter Information, Inc.; Skinder Strauss Associates; the Software & Information Industry Association; the Thomas Publishing Company; The Thomson Corporation; and Warren Publishing, Inc.

CADP's members are an integral part of the U.S. database community. Today, the United States is the world leader in the creation and distribution of information databases. In fact, presently about two-thirds of the world's databases are produced in the United States. Our members employ or represent many thousands of editors, researchers, and others who gather, update, verify, format, organize, index and distribute the information contained in their vast array of database products and services. They also invest millions of dollars annually in the hardware and software needed to manage these large bodies of information.

Together, CADP's members and others in the U.S. database industry provide the world with information on everything from antidotes to zoology and everything in between. They provide a vast array of comprehensive data vital to the successful operation of our economy, including information about health, communications, finance, banking, business, news, travel and defense.

By giving consumers and professionals comprehensive, reliable, and up-to-date tools, database creators play a crucial role in our information-driven society. The effort they exert and the resources they expend to collect, compile, arrange, standardize, correct, index, update, cross-reference, and verify collections of information adds immense value to a mass of unintelligible, disparate data typically unusable by the public. Moreover, the investments of database producers in creating, organizing, maintaining and disseminating their products and services greatly reduce the time and effort consumers need to spend to conduct important research and ensure the reliability of the facts included. Without the hard work of database producers, vast amounts of valuable information would be useless to many users. Despite the fact that these individuals would have access to raw data, they could not, or would not want to, expend the financial and human investments made by the database compiler to assure that the database is comprehensive, accurate, up-to-date, and convenient to use. Hundreds of thousands of American jobs depend on a healthy, vibrant U.S. database industry.

CADP's goal is simple and straightforward: the passage of legislation to deter piracy that causes commercial harm to database creators, while maintaining the traditional balance between the respective interests of the owners and users of information products. CADP understands that the stated purpose of H.R. 1858 was to reach a similar goal. Title I of H.R. 1858 clearly fails to do so. The so-called "balancing" between database producers and database users established by Title I is so heavily slanted toward database users, that, if enacted, it would provide little more than a road map for database pirates. Commercial law does not countenance thievery in other areas, and it should not do so here.

Title I fails to provide database producers with sufficient marketplace stability or security against piracy to encourage them to create and disseminate their databases to the public. Consequently, CADP cannot support Title I of this bill.

I. TITLE I OF H.R. 1858 DOES NOT PROVIDE MEANINGFUL PROTECTION TO DATABASE PROVIDERS.

Regrettably, Title I of H.R. 1858 does not offer database providers any meaningful protection to help insulate their valuable information products from piracy—especially in a digital environment where perfect copies of databases can be made with the click of a button and sent to others around the world instantaneously.

CADP respectfully submits, however, that such meaningful protection is offered by H.R. 354, the *Collections of Information Antipiracy Act*. As reported by House Judiciary Committee last month, H.R. 354 represents the culmination of three years of careful consideration of this important issue. In fact, twice in the last Congress the House of Representatives passed by unanimous consent database protection legislation similar to the current version of H.R. 354. H.R. 354 remains fair and balanced and is also very much a compromise measure. Since its initial introduction in October 1997, the legislation's standard of protection has been narrowed time and again. Most recently, both the Courts and Intellectual Property Subcommittee and the full Judiciary Committee adopted a series of amendments to H.R. 354 in response to various concerns raised by the Administration and database users. According to the Administration, the resulting bill "now provides protection for research, educational and other [including commercial] purposes... at least equivalent to 'fair use' under the copyright law."¹

It is our opinion that Title I of H.R. 1858 does not provide *any* significant protection against database piracy. Indeed, from the Coalition's perspective almost every section of Title I raises a concern of either ill-advised policy judgments or unintended consequences. For many important reasons, therefore, some of which we will outline briefly below, CADP believes that no new legislation is better than the enactment of Title I of H.R. 1858.

II SPECIFIC CONCERNS ABOUT H.R. 1858

A. Private Parties Cannot Sue to Defend Their Interests

Title I denies injured database producers the ability to file lawsuits against those who misappropriate their products. Instead, it places their fate exclusively in the hands of a federal agency—the Federal Trade Commission ("FTC")—which faces myriad demands on its limited monetary and personnel resources. By definition, the

¹ Letter of Andrew J. Pincus, General Counsel, U.S. Dept. of Commerce, to the Honorable Henry Hyde, Chairman, House Committee on the Judiciary, May 25, 1999.

FTC's jurisdiction is expansive to begin with: it must contend with all types of unfair competition and deceptive business practices.²

Despite the broad range of regulated activity, however, the voluminous statutes administered by the Commission generally fall into two broad categories. First, the Commission administers statutes which indirectly protect consumers by ensuring that the marketplace functions properly—such as the Sherman and Clayton Acts. In these types of cases, Congress has justifiably declined to leave the detection of destructive market conduct solely to an agency with limited financial and personnel resources. The market, and ultimately the consumer, is better served by giving parties materially harmed by this conduct a private cause of action. By giving the FTC sole power to implement its operative provisions, Title I adopts a "command and control" approach to the regulation of the database market. Given that this Committee has recently looked askance at bureaucratically centered market regulation, we are surprised that it has chosen such an approach.

The second category of statutes enforced by the Commission relates to deceptive conduct that affects consumers directly, such as truth in labeling, odometer laws, and credit card fraud. Such laws regularly do not provide a right of action to the individual consumer. Instead, the Commission, after investigation, acts to protect the interests of consumers as a group after receiving complaints about a particular practice or company.

Here, many potentially wrongful acts which Title I tries—but fails—to prevent fall within the first category. By protecting the producer from piracy—which is, by definition, an anticompetitive act—a database protection statute indirectly protects consumers by: (1) preventing market failure caused by free-riders and (2) encouraging dissemination of as wide a variety of databases as consumer demand will bear. These goals are much more effectively achieved through a private right of action, as they are in the vast majority of intellectual property as well as antitrust laws.

Moreover, as a practical matter, official movement within the FTC regularly commences only after lengthy industry-wide investigatory sweeps and numerous private complaints. Indeed, it is our understanding that it is not unusual in complex or novel situations—or in cases involving the application of new statutory authority—for the FTC to investigate an alleged or suspected unfair practice for a full year prior to initiating official action before an administrative law judge.³ Current digital technology has given users the power to eviscerate the market for a database in a fraction of that time. In fact, the emergence of new information technologies has made the FTC's job particularly difficult. The agency itself has warned that "rapid increases in... Internet fraud could reduce the ability of this agency to achieve its consumer protection goals... Continued growth of the merger wave and of competitive forces for change in important sectors of the economy strain the agency's ability to meet its goal of maintaining competition."⁴ Without the ability to go into court for timely relief, many victims of database piracy will be out of business long before the Commission ultimately acts. It is therefore absolutely essential that any meaningful database protection regime contain a private right of action.

However, even if H.R. 1858 were revised to give private parties a right of action, the legislation would still prove an unworkable model. Indeed, the substantive provisions of the legislation as introduced place such a high burden of proof on the agency that it appears virtually impossible to imagine a situation in which market-destructive activity could be halted.⁵ This is true even after taking into account ex-

² Federal Trade Commission Act 15 U.S.C. § 45(a)(2) (1998); cf. H.R. Rep. No. 63-1142, at 18-19 (1914) (refusing to enumerate prohibited acts of unfair competition in the Federal Trade Commission Act, on the grounds that "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field... If Congress were to adopt the method of definition, it would undertake an endless task.").

³ See Federal Trade Commission Act 15 U.S.C. § 53(b) (1998). Under this section, the FTC may go directly to a district court and ask for immediate injunctive relief. This usually occurs if an unfair or deceptive practice is obvious, ongoing or egregious. In cases that would likely arise under H.R. 1858, a thorough investigation into the potential violation as well as detailed analysis of the meaning(s) of new and unfamiliar statutes would give the FTC stronger footing in case of later appeal to the Federal Courts. The FTC's findings of fact from administrative proceedings must be affirmed by a reviewing court if supported by substantial evidence. See *id.* § 45(c). A reviewing court must also give substantial deference to FTC constructions of the Federal Trade Commission Act reached by the Commission during administrative adjudication. See *id.* § 57(e)(3)(a-b). During a Section 13(b) proceeding directly to federal court, the FTC is given no such deference. Thus, in cases that would probably arise under H.R. 1858, the FTC would undoubtedly prefer the more thorough, and lengthy, administrative law path.

⁴ *The FTC's Strategic Plan Under the Government Performance and Results Act: FY 1997-2002* at "Goal 1."

⁵ Even if an action is ultimately brought, the FTC's would likely view its task complete, as long as the database pirate promises not to commit these acts in the future, since the Commis-

pedited procedures for temporary or permanent injunctive relief available through the FTC in egregious and patently obvious cases of unfair practice.

B. H.R. 1858 Provides Relief Only After an Injured Database Producer Has Posted Its "Going Out Of Business Sign"

Title I excuses far more extensive takings—and far more extensive replication—of a producer's database than is reasonable, and than has been traditionally permitted under U.S. laws governing other intellectual property laws—whether patent, trademark, misappropriation or copyright. It allows a thief to avoid liability by the simple contrivance of cutting and pasting material to what they have misappropriated so that the "new database" is not "substantially the same" as the original database. In essence, this high standard requires the FTC to establish that the new database is entirely identical, or virtually identical, to the existing one in order to prevail. For example, under H.R. 1858's "substantially the same" standard, a pirate could copy an alphabetical directory of restaurants created by database producer "A" and merge them with a separate alphabetical directory of restaurants created by database provider "B." The pirate escapes liability because, although the new database contains A and B's products in their entirety, it is "substantially the same" as neither. Thus, by permitting activity analogous to the use of a pair of scissors and a stapler, the legislation leaves the producer without a remedy.

In addition, Title I of H.R. 1858 condemns only activity undertaken in "competition" with the injured database. To be competitive, the pirate must displace "substantial" sales or licenses, and "significantly threaten" the opportunity to "recover a return" on investment. These two standards pose unduly high hurdles for database owners and far exceed the already heightened "material harm" test set forth in H.R. 354. In fact, the "significantly threaten" standard is so high it renders the general prohibition utterly meaningless. For instance, as long as a company remains in business and the product remains for sale or license, the "opportunity to recover a return" exists.⁶ Significant harm exists, presumably, only when the market for the database has been totally destroyed. Moreover, the fact that the prohibition is limited to the displacement of substantial sales or licenses insulates from liability wholesale copying of those databases which are neither sold nor licensed, but which generate revenues through the sale of advertising space—a growing source of revenue for various database producers.

C. Title I Exempts an Intolerably Wide Range of Both Nonprofit and Profit-Seeking Scientific, Educational and Research Takings.

CADP recognizes that nonprofit users should have somewhat more leeway to appropriate the contents of a protected database than do profit-seeking ones. Under H.R. 354, for example, *nonprofit* scientific, educational and research takings are generally exempt only if they do not materially harm the primary market for a database. Moreover, both nonprofit and profit-seeking users may be totally exempt under H.R. 354's reasonable use exception. The distinction between eleemosynary and profit-making entities is based, in part, on the widely accepted premise that profit-seeking entities must and should be held to a higher standard, because securing lawful, authorized access to the products of others is part of the cost of doing business, whether those products are tangible or intangible (as in the case of databases).

In contrast, Title I of H.R. 1858 draws no distinction between nonprofit and profit-seeking scientific, educational or research uses. Neither does it acknowledge that

sion's regular enforcement strategy is to settle cases via consent order. In exchange for no admission of past wrongdoing, the defendant agrees to a court order directing it to cease its allegedly wrongful conduct. From the Commission's standpoint, these agreements efficiently restore balance to the marketplace while preserving the Agency's resources for cases in which the defendant insistently denies liability, or in which the statutory violations are so egregious that justice dictates that the Commission litigate the case thoroughly. Although perhaps a sound way to use the Commission's limited resources, it provides scant comfort to the database producer who has seen its product pirated; the wrongdoer keeps its ill-gotten gains, while the producer is left with no remedy. By virtue of this provision alone, Title I provides no deterrent to wrongful conduct.

⁶The "return" threshold in H.R. 1858 would be inoperative in any practical sense, even if Congress defined "a return" with specificity. Database producers offer hundreds, if not thousands, of discrete products and services. This, in itself, presents no problem. What makes the Section 101(5)(B) threshold inoperative is that the myriad of database products and services are produced under conditions of common and joint costs which, in simple economics language, means that total costs cannot meaningfully be allocated to the production of individual products. Computing a rate of return, any rate of return, becomes a meaningless exercise. This is not a novel conclusion. The economic deregulation of a host of industries over the past twenty years is due in large part to the inability of rate-of-return regulation to generate results consistent with an incentive-driven economic marketplace.

such unauthorized takings may injure markets, or that profit-seeking and non-profit "scientific, educational [and] research" entities, including companies, institutions and individuals, are very important markets for many database publishers. Instead, Title I offers database producers no protection for those markets except in those exceedingly narrow instances where the offending activity is part of a "consistent pattern engaged in for the purpose of direct commercial competition..."

Under Title I, both damaging single or occasional acts of piracy are tolerated, and the impact of such activity being or becoming widespread is wholly ignored. A single act of misappropriation that destroys a database's market—such as an individual uploading a database onto the World Wide Web under the guise of accomplishing some "research" or "educational purpose"—would go completely unpunished. Indeed, even if particular acts of piracy are part of a "consistent pattern," they are still permitted unless undertaken "for the purpose of direct competition." This further limitation would apparently exclude unauthorized dissemination within business entities and institutions; takings motivated by a desire to avoid payment of fees; piracy of databases in related markets; and whatever else may be conjured up as mere "indirect competition."

D. H.R. 1858 Allows Government Entities to Lock Up Information

The bill, in section 101(6), exempts only federal government databases from protection. State and local governments may claim protection for data under the bill. As a matter of fundamental public policy, we believe that this is an unwarranted imposition on the flow of government information.

E. H.R. 1858 Hurts Small Information Businesses by Allowing Corporate Users to Pay for Only One Copy of a Database

Title I of the bill prohibits only the sale or distribution "to the public" of a database that duplicates another database and is sold or distributed in commerce in competition with that database. The breadth of this exclusion would permit many market harmful acts, including dissemination of databases over closed electronic networks. In addition, unauthorized distribution within business entities, institutions, consortia, and other presumably nonpublic environments would likely grow. For example, a large profit-seeking corporation that scans an entire database into its computers and makes it available over a corporate intranet to every employee would not violate the Act's provisions.

F. Title I's Service Provider Liability Exemption Is Overly Broad

Section 106(a) of H.R. 1858 exempts service providers from any liability for a violation, as long as they do not initially place the offending database on its system or network, irrespective of whether they receive a direct financial benefit. This is a far more extensive exclusion than the detailed, conditional limitations on certain relief accorded to service providers under the *Digital Millennium Copyright Act* ("DMCA")—passed less than a year ago—and in our view, is unwarranted.⁷ We are aware, Mr. Chairman, that the Judiciary Committee has indicated its intent to revise the Internet service provider provisions now contained in H.R. 354, so that they more closely resemble those found in the DMCA.

G. Misuse Provisions Invite Government Micro-management of Legitimate Business Practices

Section 106(b) of the legislation precludes liability if the "person benefiting from the protection accorded a database" misuses the protection. As an initial matter, it is far from clear how misuse is relevant at all, as the FTC would have sole enforcement authority. Presumably, the Commission acts to vindicate the public interest (rather than private benefits) in database protection, and should not be deterred by alleged misdeeds of the victimized parties. This section's description of the "factors" in a judicial "misuse" inquiry are little more than barely disguised attacks on—and bases for judicial regulation and indirect but potent FTC regulation of—pricing, contracting, technology deployment, and other entirely legitimate business practices. The section will cause protracted proceedings over issues generally irrelevant to the question of database piracy. Its provisions are so broad that any attempt by a publisher to protect the investment in its database through password access, licensing terms, or trade secret policies could easily present a factual dispute as to whether the provider has "misused" its protection.

⁷ See Pub. L. No. 105-304, 112 Stat. 2860 § 5123(a-d)(1998).

III. H.R. 1858 DOES NOT PROVIDE PROTECTIONS EQUIVALENT TO THOSE ESTABLISHED IN THE EU DATABASE DIRECTIVE

In March 1996, the European Union adopted a Directive on the protection of databases, which creates a new *sui generis* right similar to copyright.⁸ The Directive constitutes an obvious effort by the EU countries to increase their share of the growing global database market, primarily at the expense of U.S. database providers. Generally, under the Directive, databases created outside the European Union are not protected from piracy unless the countries in which these owners reside provide a level of protection that the EU Commission deems "comparable."⁹ Without comparable U.S. legislation, U.S. databases will not be protected from piracy in Europe, thereby placing the U.S. database industry at a significant competitive disadvantage in the huge EU market.¹⁰ Each day that passes without fair, balanced and comparable U.S. legislation gives the EU database-producing industry another leg up on its U.S. competitors.

Consistent with the EU's requirements, many of the United States' major trading partners in the EU have already implemented comparable database protection laws. Belgium, Sweden, Austria, Denmark, Finland, Germany, Spain, France, and Great Britain have all passed database protection legislation.¹¹ As time passes, however, the vulnerability of United States databases will not be limited to the EU alone. The U.S. may also suffer disadvantages in developing markets.

Many Latin American countries, for example, have bilateral reciprocity-based relationships with Spain, which will require the enactment of similar statutes. In addition, Eastern European countries, either in the interest of gaining admission to the EU, or as a result of bilateral agreements, will probably also pass database protection laws within the next few years. Therefore, it is imperative that the U.S. government act without further delay to establish law in this country that is commensurate with U.S. traditions and practices, so that the EU Commission can view it as providing protection that is comparable to that afforded under the EU Directive.

There can be no doubt that the protection provided under H.R. 1858 falls well short of protection comparable to that provided in the EU directive. Even a cursory comparison of Title I and the EU Directive reveals its shortcoming in the context of EU comparability. The most significant areas of difference between H.R. 1858 and the EU Directive are found in the general prohibition provision, the limitations and exceptions to the prohibition, and the remedies and means for enforcement. A brief comparison of these provisions will illustrate H.R. 1858's deficiencies.

With regard to the general prohibition, the protections against database piracy in H.R. 1858 are much narrower than those set forth in the EU Directive. The EU Directive provides EU-based database producers and database producers from countries with comparable laws with an exclusive right to authorize and prevent the extraction and re-utilization of a protected database.

H.R. 1858 provides no such rights. Whereas the EU Directive applies to the acts of extraction and utilization, H.R. 1858 only covers the acts of sale and distribution.¹² As already noted above, Title I's limited prohibition is narrowed further by requiring that a database be sold or distributed to the public, so that sales and distributions within an organization or to small groups of people would likely fall outside the bill's provisions. The prohibitions against sale and distribution in H.R. 1858 are further limited in that they only apply: (1) where the two databases at issue are identical or virtually identical; (2) the database "displaces substantial sales or licenses of the database"; and (3) the database "significantly threatens the opportunity to recover a return on the investment" of the database. There is little doubt that the EU Commission would never judge these provisions of H.R. 1858 as comparable protection.

With regard to the exceptions and limitations, those found in H.R. 1858 vastly exceed the ones enumerated in the EU Directive. The EU Directive provides four exceptions, namely (1) a fair-use type exception; (2) a private purpose exception; (3) a limited exception to the extraction right for the purpose of illustration for teaching

⁸ See Directive 96/EU of the Eur. Parl. and of the Council on Legal Protection of Databases, art. 7, Feb. 5, 1996 [hereinafter EU Directive].

⁹ See EU Directive, *supra* note 5, recital 56.

¹⁰ It appears the only other option for non-EU database producers seeking to protect their products in Europe is to create a substantial presence in Europe, which can be accomplished only at the expense of U.S. jobs and tax revenues.

¹¹ The Commission recently began the formal procedure for bringing legal action against the remaining six states. Those states not currently meeting their obligations can be expected to do so in the near future.

¹² See Council Directive, *supra* note 5, art. 5.

and scientific research; and (4) a public security and judicial procedure exception.¹³ Title I of H.R. 1858 contains many more exceptions and limitations. In addition to certain generally accepted limitations also found in H.R. 354—such for news reporting and law enforcement activities—the bill also includes extremely broad exceptions for service providers and those who merely claim that their use is for scientific, educational, or research purposes. These extremely broad exceptions, in conjunction with the limitations discussed in the preceding paragraph, quite clearly weaken the general prohibition to such an extent that it cannot be considered remotely comparable to the rights afforded under the EU Directive.

Finally, the remedies and means of enforcing the prohibitions in H.R. 1858 pale in comparison to the European standard. The EU Directive gives database producers the right to remedial action against acts of piracy. As discussed in detail earlier, H.R. 1858 reserves that right solely for the FTC. Accordingly, the remedies provided for under H.R. 1858 cannot be considered to be comparable to those found in the EU Directive.

CADP does not advocate adopting a U.S. database protection law that mirrors the EU Directive but ignores traditionally accepted U.S. concepts of protecting intellectual property. At the same time, however, the U.S. database industry cannot endorse enactment of a law whose deficiencies in regard to adequate protection at home also increase the discrepancies between U.S. and EU law.

CONCLUSION

As stated above, H.R. 1858 fails to provide the protections necessary to deter piracy of existing databases and to afford U.S. database producers adequate incentive to create new valuable databases and make them generally available. In particular, H.R. 1858 fails to provide any meaningful protection to database owners and fails to establish a level of protection necessary to ensure that U.S. databases will be protected at home and abroad.

Consumers will not have access to databases that are not produced or offered in commerce; the best way of ensuring an abundant supply of databases tailored to varied needs at competitive prices is to assure that database producers enjoy the incentives to produce and maintain afforded by a market economy. Each day that passes increases the threat that another company will have the products its has invested so many resources to create stolen from it. We believe that both producers and users will benefit much more from market stability and predictability, goals which regrettably cannot be attained under the provisions of H.R. 1858.

Thank you again for the opportunity to present the views of CADP on this important issue. I will be happy to answer any questions.

Mr. TAUZIN. The Chair is now pleased to recognize Ms. Phyllis Schlafly. Next will be Tim Casey and then will be James Neal, in that order. Ms. Schlafly.

STATEMENT OF PHYLLIS SCHLAFLY, PRESIDENT, EAGLE FORUM

Ms. SCHLAFLY. Mr. Chairman and members of the subcommittee, Eagle Forum, a nationwide organization with some 80,000 members, compiles databases and uses database information compiled by others. Among the important current issues we are concerned about is the defense of the rights of patients to access and control their own medical information.

We oppose granting special interests, expansive new Federal rights to control databases. We also oppose expansion of the Federal criminal justice system to cover routine business disputes. Data-like facts belong to all of us, not merely to the government or to special interests.

We all benefit from the transformation of facts and data into interesting or valuable forums. Whether it is a comparison of Mark McGwire's statistics to Babe Ruth's or an analysis of real estate or automobile sales in a community, the free market, not the Federal

¹³ See *id.* art. 6, cl. 1-2.

Government, should be guiding the transformation of facts into useful forms.

We support your Commerce Committee bill, H.R. 1858, because it protects the existing rights of individuals to extract essential data such as their medical records. We support your bill because it does not create draconian new Federal crimes with respect to facts or databases.

Your Commerce Committee bill is far superior to H.R. 354, recently approved by the Intellectual Property Subcommittee. The Commerce Committee bill protects the right of individuals to access data such as their medical records, and it does not limit the right of access to or the extraction of data.

State laws guaranteeing the right of individuals to access data, such as their medical records, remain intact under your bill. When a family switches doctors or gets a second medical opinion, it needs to access all of its medical records immediately and transfer them to the new doctor.

No entity should have a proprietary interest that can exclude this legitimate access. When families switch health plans or doctors, they should not have to duplicate medical tests because their initial health plan refuses to release their records.

We also need unrestricted access to information about the side effects of prescription drugs and vaccines. We oppose the Intellectual Property Subcommittee bill which preempts these fundamental rights of individuals. In response to criticism, the Intellectual Property Subcommittee recently added section 1405(h), but that language only makes the matter worse.

The Intellectual Property Subcommittee bill is fatally defective. The Commerce Committee bill is superior to the Intellectual Property Subcommittee bill with respect to Federal criminal law. It is undesirable to expand Federal criminal jurisdiction over business disputes. The free market should function through competition, not through the Federal criminal court system.

Businesses should not be encouraged to demand that Federal prosecutors bring actions against their competitors. Civil court is where business disputes belong. The Intellectual Property Subcommittee bill creates new prison sentences of 5 and 10 years and new Federal fines of \$250,000 and \$500,000 for routine business activities that are now perfectly legal. Neither the public nor the Federal court system benefits from the creation of vast new Federal crimes.

We support the exclusion in your bill of statutory protection for any database that has been misused. The doctrine of misuse is well established in copyright law and your bill wisely incorporates this doctrine.

The Intellectual Property Subcommittee bill on the other hand conspicuously bestows legal entitlements on those who misuse databases. Indeed, one of its original purposes was to overturn a 9th circuit decision that it found database misuse by the American Medical Association.

In light of the unanimous Supreme Court decision in *Feist*, originality is a constitutionally protected, mandated prerequisite for copyright protection. New Federal protections for databases should

be addressed by the Commerce Committee, rather than the Subcommittee on Intellectual Property.

Databases of public domain facts are not a form of intellectual property, nor should they be. There is no intellectual property issue at stake with respect to databases, and the attempt by the Intellectual Property Subcommittee to create a new right in databases is contrary to the Constitution.

Moreover, the sine qua non of intellectual property law is to encourage the creation of works that might not otherwise be created. But the Intellectual Property Subcommittee bill seeks to protect databases already in existence for which no incentive is necessary. That violates the very purpose of intellectual property law and amounts to a giveaway to a few special interests.

Thank you, Mr. Chairman, for this opportunity to discuss the advantages of your bill.

[The prepared statement of Phyllis Schlafly follows:]

PREPARED STATEMENT OF PHYLLIS SCHLAFLY, PRESIDENT, EAGLE FORUM

Mr. Chairman and Members of the Subcommittee. I am Phyllis Schlafly, president of Eagle Forum. Thank you for giving me this opportunity to testify.

Eagle Forum, a nationwide organization with some 80,000 members, both compiles databases and uses database information compiled by others. Among the important current issues we are concerned about is the defense of the rights of patients to access and control their own medical information. We oppose new federal entitlements to special interests, such as expansive new federal rights to control databases. We also oppose expansion of the federal criminal justice system to include routine business disputes. Eagle Forum has published numerous reports on these topics.

Eagle Forum supports H.R. 1858 because, while it prohibits unfair copying of databases, it does not prohibit the extraction of information from databases. It is increasingly important for individuals and small businesses to be able to extract information from databases. Individuals, for example, need to access their own medical data in order to obtain second and third medical opinions. We also need unrestricted access to public-domain medical information to learn about side effects of prescription drugs and vaccines. Analysts have estimated that almost half of all Internet users have searched for medical information online. We oppose any database legislation that creates new barriers to legitimate access to medical data.

Small businesses likewise need access to data simply to survive in our information-dominated society. We do not want new legislation that encourages the monopolization of data or makes access to data suddenly costly or impossible. Data, like facts, belong to all of us, not merely to the government or to special interests. We all benefit from and use the transformation of facts and data into interesting or valuable forms. Whether it is a comparison of Mark McGwire's home run statistics to Babe Ruth's, or an analysis of real estate or automobile sales in a community, the free market rather than the federal government should be guiding the transformation of facts into useful forms. No federal database legislation should make it more difficult for us to obtain legitimate access to data.

We support H.R. 1858 because it protects the existing rights of individuals to extract essential data such as their medical records. We support H.R. 1858 because it does not create draconian new federal crimes with respect to facts or databases. We support H.R. 1858 because it excludes from its protection those who misuse data. We support H.R. 1858 because it treats database issues as within the jurisdiction of the Commerce Committee rather than the Subcommittee on Courts and Intellectual Property.

On each of these important points, H.R. 1858 is far superior to H.R. 354, which was recently approved by the Subcommittee on Courts and Intellectual Property.

I. INDIVIDUALS' RIGHT TO ACCESS DATA

Individuals must retain their right to access data such as their medical records. Both Republicans and Democrats support this right. For example, one year ago Vice President Gore declared in a commencement address at New York University that "you should have the right to choose whether your personal information is disclosed; you should have the right to know how, when, and how much of that information

is being used; and you should have the right to see it yourself, to know if it's accurate."

H.R. 1858 protects this right of individuals to access data such as their medical records. It only limits the competitive sale or distribution to the public of a copy of someone else's database. H.R. 1858 does not limit the right of access to or extraction of data. State laws guaranteeing the right of individuals to access data such as their medical records thus remain intact under H.R. 1858.

Let's look at an example. When a family switches doctors or obtains a second medical opinion, it needs to access all of its medical records immediately and transfer them to the new doctor. Many state laws protect the right of families to gain access to their medical records, and thus guarantee that a patient always has access to his medical records. State laws ensure that patient access to medical records is prompt, which is particularly important when a patient is seeking a second medical opinion.

When it comes to medical information, no entity should have a proprietary interest that can exclude legitimate access by others. When families switch health plans or doctors, they should not have to duplicate medical tests because their initial health plan refuses to release their records. Federal legislation should not preempt state laws that guarantee to patients the right to access their own medical records. Special interests should not obtain federal entitlements to databases that enable them to exclude access by others.

H.R. 1858 properly avoids preemption of state laws that assure rights of access to medical records and other information. It is far superior to H.R. 354, which preempts these fundamental rights of individuals. Section 1405(b) of H.R. 354 preempts existing state laws guaranteeing access to data, and thereby allows health care providers to deny patients access to medical records. Under the doctrine of *expressio unius est exclusio alterius*, H.R. 354 preempts state laws guaranteeing an individual's right of access to his own records. While H.R. 354 itself does not prohibit the extraction of an "individual item of information," its preemption of the state laws deprives the patient of his right to access his own medical information.

In response to criticism, Section 1405(h) was recently added to H.R. 354 to state that "[n]othing in this chapter shall be construed to authorize any person to . . . extract personally identifying information, including medical information." But this addition only exacerbates the central defect of H.R. 354 in prohibiting legitimate access to information. Families need access to medical information, and H.R. 354 improperly denies them such access.

New federal legislation concerning databases must limit itself to the issue of unfair copying, not deny existing rights to access and extract information. H.R. 1858 incorporates the best approach, while H.R. 354 is fatally defective.

II. AVOIDANCE OF DRACONIAN NEW FEDERAL CRIMES

H.R. 1858 is far better than H.R. 354 with respect to federal criminal law. It is undesirable to expand federal criminal jurisdiction over business disputes. The free market should function through competition, not through the federal criminal court system. Businesses should not be encouraged to demand that federal prosecutors bring actions against competitors. Civil court is where business disputes belong, and it is a mistake to expand federal criminal law to commercial disagreements.

In contrast to H.R. 354, H.R. 1858 admirably refrains from establishing draconian new federal crimes in order to protect narrow special interests. H.R. 354 creates new prison sentences of 5 and 10 years for routine business activities that are now perfectly legal. H.R. 354 also creates new federal fines of \$250,000 and \$500,000 for such activities. Neither the public nor the federal court system benefits from the creation of vast new federal crimes that are designed to police activities such as the posting of public domain medical information or baseball statistics on the Internet.

Severe new criminal penalties are particularly inappropriate when the legislation is ambiguous. New federal crimes that are framed in ambiguous language have the effect of chilling lawful, beneficial activity. The central provision of H.R. 354 is filled with ambiguous terms such as "substantial part," "material harm to the primary market or a related market," and "intended to be offered in commerce." It is impossible to predict how the courts would interpret these terms, and thus criminal penalties of up to 10 years in prison and \$500,000 fines would have an unwarranted chilling effect on many legitimate and valuable activities. H.R. 354 even includes a provision to permit an alleged database owner to submit a "victim impact statement" about his alleged business injury from someone else's use of facts such as medical information or baseball statistics. H.R. 354 thereby attempts to transform competition into a federal crime, and trivializes federal criminal law in the process.

H.R. 1858 uses clearer language than H.R. 354, and omits the draconian new criminal penalties. H.R. 1858 thereby avoids the chilling effects of H.R. 354, and avoids expanding federal criminal law to include ordinary business disputes.

III. EXCLUSION OF PROTECTION FOR MISUSE OF DATA

We support the exclusion in H.R. 1858 of statutory protection for any database that has been misused. The doctrine of misuse is well-established in copyright law and H.R. 1858 wisely incorporates this doctrine into this database statute as well. The rationale is simple: misuse of rights over a database disqualifies the perpetrator from legal protection. Our legal system disfavors providing relief to wrongdoers under the doctrine of unclean hands. H.R. 1858 incorporates this principle.

H.R. 354, however, conspicuously bestows legal entitlements on those who misuse databases. Indeed, one of the original purposes of H.R. 354 was to overturn a Ninth Circuit decision that had found misuse by the American Medical Association (AMA) in control of a database. In *Practice Management Info. Corp. v. AMA*, 121 F.3d 516 (9th Cir. 1997), the Ninth Circuit denied the enforceability of an AMA copyright on the medical billing CPT coding system because the AMA had "misused" its copyright. As a result, the Ninth Circuit denied enforceability by the AMA of exclusive rights to the CPT database.

It was only two months later that the predecessor to H.R. 354 was introduced in the House, and six months later the AMA provided the key testimony in support of that bill. H.R. 354 bestows special federal entitlements even on those who are found to have misused their rights. H.R. 354 is apparently designed to benefit special interests such as the AMA by overfunding well-reasoned appellate decisions.

IV. DATABASE IS A COMMERCE ISSUE, NOT AN INTELLECTUAL PROPERTY ISSUE

In the unanimous Supreme Court decision of *Feist Publications v. Rural Telephone Service*, 499 U.S. 340 (1991), the Court held that: "Facts, whether alone or as part of a compilation, are not original, and therefore may not be copyrighted. . . . [O]riginality is a constitutionally mandated prerequisite for copyright protection." There is widespread agreement with this ruling, and it deserves credit in promoting the information-based economy that has benefited everyone in recent years.

In light of this unanimous decision, new federal protections for databases, as compilation of facts, should be addressed by this Subcommittee rather than the Subcommittee on Courts and Intellectual Property. Automatically generated databases of public domain facts are not a form of intellectual property, nor should they be. Rather, databases are compilations of data useful to individuals and businesses in commerce.

H.R. 1858 recognizes that unfair copying of a database should be treated as an unfair or deceptive act or practice under section 5 of the Federal Trade Commission Act. Section 107(c) of H.R. 1858 recognizes that there is no intellectual property issue at stake with respect to databases. The attempt by H.R. 354 to create a new *sui generis* intellectual property right in databases is contrary to the Constitution. The extent to which the Constitution allows copyrights to cover factual compilations has already been delimited by the *Feist* decision.

Moreover, the *sine qua non* of intellectual property law is to encourage the creation of works that might not otherwise be created. The Constitution expressly includes this requirement in Article I, Section 8, clause 8: "To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Supreme Court has repeatedly affirmed that the plain meaning of this clause is "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954), which was quoted with approval in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

But H.R. 354 seeks to protect databases already in existence, for which no incentive is necessary. Its retroactive application violates the very purpose of intellectual property law, and thus amounts to a giveaway to a few special interests. H.R. 1858 properly applies only to a database "that was collected and organized after that date." Thus H.R. 1858 does not favor existing entrenched interests, and limits its protections to databases to which the incentive applies.

V. NEED FOR A TIME LIMITATION

Finally, I suggest that H.R. 1858 be modified to include a time limitation on the protections provided by this Act. Not even copyright or patent rights last forever; nor should new database rights be in perpetuity. Databases are being compiled at

an unprecedented rate, and it is far from clear that new federal protections of databases are even economically desirable.

The markets for databases of facts and other public domain information appear to demand timely updates to the databases, so I do not believe that new protections for old databases will promote commerce.

Five years of federal protection should give a more than adequate opportunity for a compiler of data to attain a return on its investment. Thereafter the public should not be prohibited from copying any uncopyrighted data for lawful and beneficial purposes.

Mr. Chairman, I am grateful for this opportunity to discuss the advantages of H.R. 1858. I appreciate the Members of this Subcommittee in drafting this superior legislation and holding this important hearing. We look forward to working with this Subcommittee on this legislation.

Mr. TAUZIN. I thank the gentlelady. The gentlelady was singing our jurisdictional song.

The Chair is now pleased to recognize Mr. Tim Casey, chief technology counsel for law and public policy at MCI WorldCom.

**STATEMENT OF TIMOTHY D. CASEY, CHIEF TECHNOLOGY
COUNSEL, LAW AND PUBLIC POLICY, MCI WORLDCOM**

Mr. CASEY. Thank you, Mr. Chairman and Mr. Bliley and other members of the subcommittee. Thank you for inviting MCI WorldCom to testify on behalf of H.R. 1858. As many of you have recognized, H.R. 1858 takes the right approach to database protection. It prevents the thefts of databases, but also maintains the public's access to information that promotes progress and innovation in this age of information.

My company builds and operates communications networks so we understand the legitimate need for protection from the theft of certain database products; but we also know very well what can happen when protection goes too far. That is why we like H.R. 1858 and its measured approach.

It doesn't start with overly broad protection and then attempt to exempt or carve out every important type of database or use of a database that anyone can think of. There are many databases and many uses of databases that could be considered harmful to the economy and the American public if protected in such a broad form.

More importantly, we don't even know what they are yet, and we should not have to try to figure this out in advance. In relation to other legislation, we came up with an idea based on my mom's own interest in genealogy, and that resulted in an exemption for genealogical information. You can come up with a thousand other examples of information that should be exempted from overly broad protection, but the American public should not have to be doing that in advance of this legislation.

Sound legislation should begin with a narrow scope of protection and build on that base only to the minimal extent necessary. Like H.R. 1858, it lays a solid foundation upon which a new law can rest, not an unstable base. If the legislation is not well structured, Congress will spend many years trying to correct what could have been done right now.

H.R. 1858 contains exclusions and exemptions related to computer programs and the Internet because it has to. Telecommunications and the Internet depend heavily on databases that could otherwise be protected and therefore closed off from free public use.

A narrow approach by its very nature allows for derivations of those databases and uses that allow for innovation to continue.

A broad approach, by contrast, sweeps in and thereby prevents new and innovative uses of collections of information. Let me try to explain that within the context of the Internet. Most users of the Internet do not fully appreciate how much the underlying networks depend on databases. These networks will not operate without free and open access to thousands of databases that are necessary for everything from call routing to operator services to accurate billing. The Internet is just a combination of network computers and their databases, and as such is particularly dependent upon the open sharing of information.

Internet protocol addressing, data packet routing, conversion tables, protocol priority listings, file format information, and domain name registries are just a few examples of the type of functions performed within the Internet every minute of every day through reliance on what are presently publicly available databases, but which may not be if the wrong choice is made in terms of the legislative approach.

The Internet protocol upon which all Internet communications are based makes liberal use of databases. At the application level where many electronic commerce resources will reside and hopefully thrive, a wide variety of additional protocols and application types are used that require open access to open databases.

These types of data that must be shared to ensure that Internet users can communicate effectively are as varied as the applications themselves. People must be free to link to sites, to frame to sites, to collect information for their own use and to create new products and services such as the Yahoo! example that Chairman Tauzin used earlier.

Open access to the databases underlying the operation of the Internet has allowed it to grow and flourish. Any threat to the open access poses an unacceptable risk to the future of this new medium and all the economic and societal benefits that it promises.

H.R. 1858 is the correct approach because it does not require that every critically important use of the database be called out and exempted up front. We cannot and should not be required to bear the burden of anticipating the future. H.R. 1858 does not require us to do this to the same extent and assures that no self-interested party will be able to hold the Internet hostage by locking up databases which are vital to its operation.

As a pioneering leader in the communications industries, MCI WorldCom believes that H.R. 1858 meets the need of both the communication industries and the database industry without unduly upsetting hundreds of years of legal principles. H.R. 1858 will prevent the outright theft of valuable databases while leaving in place the access to information on which our economy and our society will increasingly depend.

Thank you, Mr. Chairman and members of the subcommittee, for inviting me to testify. I will be happy to take questions later.

[The prepared statement of Timothy D. Casey follows:]

PREPARED STATEMENT OF TIMOTHY D. CASEY, CHIEF TECHNOLOGY COUNSEL, MCI
WORLDCom

Chairman of the Committee, Mr. Bliley, Subcommittee Chairman, Mr. Tauzin, and other Members of this Subcommittee, thank you for inviting MCI WorldCom to testify on behalf of H.R. 1858, the "Consumer and Investor Access to Information Act of 1999."

As you, Chairman Bliley, and the cosponsors of this bill have clearly recognized, the approach to database protection embodied in H.R. 1858 strikes the appropriate balance between the need to prevent the theft of collections of information and the equally important need to maintain public access to information to promote progress and innovation in this Age of Information—and beyond.

Although I am in the business of building and operating communications networks, I clearly understand that those who are engaged in the building of databases for a living must be provided some limited protection against the misappropriation of their investments.

In contrast to H.R. 1858's measured approach, alternative attempts at legislation began with an overly-broad scope of protection and then exempted, or carved out, one existing or potential use after another. To date, numerous examples continue to arise regarding uses of data that may be considered harmful to the economy and the American public if protected in this broad form.

It is a precept of sound legislation to begin with a narrow scope of protection and to build on that core protection only to the minimal extent necessary. Doing so lays a solid foundation upon which the new law can rest; doing otherwise, results in an unstable base which ultimately will not support the unwieldy structure above.

Though H.R. 1858 contains a number of exemptions, they have more to do with the need to clarify that certain types of databases must forever remain outside the scope of protection to be afforded. The innumerable databases upon which modern telecommunications and the Internet depend are one such example.

The principal risk associated with a broad scope of protection is the actual or potential outlawing of value-added uses, commonly referred to as "transformative" uses, which build on existing collections of information. A narrow approach by its very nature allows such innovation to continue, maintaining the public benefits flowing therefrom. A broad approach, by contrast, sweeps in—and thereby prevents—new and innovative uses of collections of information.

Most users of the Internet and telecommunications services—and even many of the providers of such services—do not fully appreciate the underlying communication networks' dependency on databases. These networks will not operate without free and open access to thousands and thousands of databases necessary for everything from call routing to operator services to accurate billing. The Internet—which is just a combination of network computers and their databases—is particularly dependent upon the open sharing of information. Internet Protocol addressing, data packet routing, conversion (look up) tables, protocol priority listings, file format information, and domain name registries, are just a few examples of the types of critical functions performed within the Internet every minute of every day through reliance on what are presently publicly available databases.

To communicate using the Internet, a host computer (meaning any end point computer on the Net) must implement a layered set of communications protocols comprising the Internet Protocol suite. These include the Application Layer; the Transport Layer; the Internet Layer; and the Link Layer.

At the application level, where many electronic commerce resources will reside and hopefully thrive, a wide variety of protocols and application types are used that require access to open databases. The types of data that must be shared to ensure that Internet users can communicate effectively are as varied as the applications themselves.

Increasingly, protocols implemented in the Transport Layer will be relied upon to guarantee delivery of particularly important Internet communications. The individuals and businesses depending on electronic commerce for the accurate, timely delivery of their communications will also depend on unencumbered access to the databases supporting all such services.

Further, all these layers are based on Internet Protocol (IP), which is itself a constantly evolving standard that depends on access to publicly available databases.

Open access to the databases underlying the operation of the Internet has allowed it to grow and flourish. Any threat to that open access—however remote—poses an unacceptable risk to the future of this new medium and all of the economic and societal benefits it promises for every American.

H.R. 1858 is the correct legislative approach because it is impossible to determine every critically important use of a database that should be exempt from an overly

broad legislative approach. Indeed, we cannot—and should not—be required to bear such a burden, and any legislative approach that imposes it will do more harm than good. H.R. 1858 assures that no self-interested party will be able to hold the Internet or the telecommunications networks hostage by locking up any databases which are vital to other parties' operations.

As a pioneering leader in the competitive telecommunications and Internet industry, MCI WorldCom believes that H.R. 1858 meets the needs of both the communications industry and the database industry without unduly upsetting traditional principles of intellectual property law. H.R. 1858 will prevent the outright theft of valuable databases while leaving in place the access to information upon which our economy—and our society—increasingly depends.

Thank you, Mr. Chairman, members of the subcommittee, for inviting me to testify today. I would be very happy to answer any questions you may have.

Mr. TAUZIN. Thank you, very much, sir.

The Chair is now pleased to welcome Mr. James Neal, dean of libraries, Baltimore, Maryland, Johns Hopkins University Libraries. Next will be Mr. Henderson and then Mr. O'Brien and finally Donald Baptiste in that order. Mr. James Neal.

STATEMENT OF JAMES G. NEAL, DEAN OF LIBRARIES, JOHNS HOPKINS UNIVERSITY LIBRARIES, MILTON S. EISENHOWER LIBRARY

Mr. NEAL. Thank you, Mr. Chairman. I am testifying on behalf of the Nation's major library association which represents 80,000 librarians and libraries in every community throughout North America. Thank you for this opportunity to appear before the subcommittee on H.R. 1858.

We very much appreciate the leadership role that you, members of the subcommittee, and the Full Committee on Commerce have taken on issues relating to access to information in the digital environment. The preservation and continuation of balanced rights and privileges in the electronic environment are essential to the free flow of information and to the success of our library and education systems. As we construct legislation for the volatile digital environment, we must remember that there are only a few inches between a halo and a noose.

H.R. 1858 strikes a balance between the interests of selected database producers, while ensuring that legitimate and appropriate access to factual information continues. Data and information are the foundation of research, scientific, and technology programs. And these facts are essential to how members of our public use information in their daily lives.

To keep this balance, all sectors, public and private, must rethink and reconfigure services and business models to meet the challenges of a network environment. Last year this subcommittee recognized that modified copyright and intellectual property regimes would be a key component in how these differing sectors adapt to the digital environment.

This is critically important that all proposals be considered in light of the need for this balance and fairness to all communities. The library community understands that unauthorized digital copying can lead to piracy. We have invested significant amounts in educational campaigns within our communities and institutions, and we have purchased technology to ensure that adequate safeguards are in place.

Libraries in the U.S. last year spent well over \$2 billion purchasing and licensing information. For example, the library acquisitions budget this year at Hopkins is approximately \$8 million, and we are spending over \$1 million to online resources, and this resource is growing.

My testimony brings your attention to three key aspects of H.R. 1858. First, the need to preserve the fair use of information and to keep factual information in the public domain.

Second, the need to promote the progress of science, education, and research. And third, the need to provide safeguards against monopolistic pricing. For over 200 years the information policy of this country has protected creativity, not factual information. This policy has served us extremely well and has allowed libraries and educational institutions and the constituencies they serve to flourish.

Access to information data are the building blocks of knowledge and are essential to the advancement of knowledge in countless fields. Our democracy is based on the premise that access to information, government information in particular, not only leads to a more informed citizenry but strengthens our Nation.

My second point. The success of our Nation's education and research systems is dependent upon the ability of educators and researchers to access data and information for multiple purposes. Scientific and research progress depends upon the ability to use public domain information, combine public and proprietary data to create new databases, and reuse existing data. Researchers typically create new knowledge by building upon the works of others.

The provisions in H.R. 1858 appropriately encourage scientific, educational, and research endeavors while at the same time providing protection to the producers of databases from commercial free-riding of their products and services. As this debate continues, it is crucially important to understand how our communities use information and engage in research activities because these activities are not exercises in commercial free-riding, but instead legitimate and legal practice.

My third and final point. An increasing number of databases, including those developed with Federal funding, are only available from a single producer. Accessing these resources can prove very problematic for members of the research and education communities. With only one point of access to a sole source database, the library has little recourse in accessing that resource.

The publisher or producer of the database is not obligated to permit transformative uses nor is there any leverage in negotiating the license to moderate cost or permit downstream activities. Provisions in H.R. 1858 provide reasonable terms and conditions for the user community, and at the same time give the producer economic benefits.

The library community is keenly aware of the problems associated with the lack of competition, for example in the journal area where we continue to experience skyrocketing costs. Some context may be helpful. Between 1986 and 1996, the consumer price index increased 44 percent. The price of health care increased 84 percent. The cost of scholarly journals increased 148 percent, more than three times the rate of inflation and nearly twice the rate of growth

in health care costs, and the price to subscriptions to online databases grew even more rapidly.

In an effort to resolve this expensive and unproductive predicament, the library community has initiated projects to inject competition and cost-based pricing into the marketplace. To be successful, though, these efforts should not be thwarted by protectionist changes to copyright and intellectual property regimes. Instead, there should be, as demonstrated in provisions of H.R. 1858, a focus on stimulating innovation and competition.

We have witnessed a significant amount of consolidation in the publishing arena within the last several years which has a profound impact on our institutions and our users.

As there is a steady contraction in the number of publishers which leads to diminished competition, we should be extremely careful that new proposals that we enact can in no way increase control over information resources.

H.R. 1858 appropriately recognizes this concern by balancing the interest of users of databases with the needs of publishers.

In closing, Mr. Chairman, we support fully the narrow and targeted approach that is taken in H.R. 1858 to ensure that there is no negative or unintended consequences for the public and private sectors which properly rely on access to data in government works.

We thank you and other members of the subcommittee for your leadership, and we look forward to working with you on this legislation.

[The prepared statement of James G. Neal follows:]

PREPARED STATEMENT OF JAMES G. NEAL, DEAN, UNIVERSITY LIBRARIES, JOHNS HOPKINS UNIVERSITY ON BEHALF OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, MEDICAL LIBRARY ASSOCIATION, AND SPECIAL LIBRARIES ASSOCIATION

Mr. Chairman, I am James G. Neal, Dean, University Libraries, Johns Hopkins University and Past President of the Association of Research Libraries and a current member of the Executive Board of the American Library Association.

I am testifying today on behalf of the nation's major library associations: the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. Collectively, we represent 80,000 librarians in research, academic, medical, public, law, state-based, and special libraries throughout North America. Thank you for the opportunity to appear before the Subcommittee to share our views of H.R. 1858, the Consumer and Investor Access to Information Act of 1999.

Mr. Chairman, we very much appreciate the leadership role that you, members of the Subcommittee, and the full Committee on Commerce have taken on issues relating to access to information in the digital environment. The preservation and continuation of balanced rights and privileges in the electronic environment are essential to the free flow of information and to the success of our library and education systems.

H.R. 1858, the Consumer and Investor Access to Information Act of 1999 strikes a balance between the interests of selected database producers while ensuring that legitimate and appropriate access to factual information continues. Data and information are the foundation of all research, scientific and technology programs. And these facts are essential to how members of the public use information in their daily lives. The library and education communities rely on access to information in all aspects of teaching and research including the preservation of our cultural and scientific heritage. Such access is integral to the success of the U.S. educational and research effort and the United States' leadership in the global economy.

Mr. Chairman, to keep this balance, all sectors—public and private—must rethink and reconfigure services, operations, and business models to meet the challenges of the networked environment. Last year, this Subcommittee recognized that new or modified copyright and intellectual property regimes would be a key component in

how these different sectors adapt to the digital environment. The new models for education, libraries, the scholarly and research communities, and businesses should foster productive and mutually beneficial relationships between public and private, commercial, and non-profit sectors. Thus it is critically important that all proposals be considered in light of the need for balance and fairness to all communities.

The library community understands that unauthorized digital copying can lead to piracy. We have invested significant amounts in education campaigns concerning appropriate use within our institutions and purchased technology to ensure that adequate safeguards are in place. This is, of course, in addition to the acquisition of hundreds of thousands of products and services.

Libraries spend well over \$2 billion every year on purchasing and/or licensing information. According to studies published in 1998 by the National Center for Education Statistics (U.S. Department of Education), the 8,981 U.S. public systems spent \$789 million on library materials, including electronic formats, in 1995. The 3,303 U.S. academic libraries spent \$1.3 billion on information services in all formats. For example, the acquisitions budget for this year at Johns Hopkins University is approximately \$8 million with approximately \$950,000 devoted to online resources, and this number is growing. These figures do not include hardware, software, network support and equipment, or personnel. And importantly, these figures do not include the financial, technological, and personnel resources devoted by libraries to preserve information resources so that they are accessible to the public over time.

My testimony focuses on three key aspects of H.R. 1858 which support the continuation of the library community's important activities.

- the need to preserve the fair use of information and keep factual information in the public domain;
- promote the progress of science, education, and research; and
- provide safeguards against monopolistic pricing.

The need to preserve the fair use of information and to keep factual information in the public domain

For over 200 years, the information policy of this country has protected creativity—not factual information. This policy has served us extremely well and allowed libraries and educational institutions and the constituencies they serve to flourish. This policy has also allowed creators and publishers to flourish. Access to data and information are the building blocks of knowledge and essential to advancement of knowledge in countless fields. Our democracy is based on the premise that access to information, government information in particular, not only leads to a more informed citizenry but strengthens our Nation. Provisions in H.R. 1858 will continue this tradition by permitting the unfettered use of facts—information which is in the public domain—while affording limited new protections to database producers necessitated by digital technology. The focus of H.R. 1858 is on direct competition, not mere use of facts, with the goal of preventing displacement of databases by unfair, anti-competitive practices.

The relatively recent explosion of digital technologies and their quick adoption into all facets of our lives has resulted in an unprecedented and growing number of databases. When coupled with the rapid deployment of computer and related technologies, individuals may obtain and use dozens of databases or sources of information, combine this data with other information, and create new information—information about personal investments, about community activities, about our environment, and more. This activity not only sparks creativity in the academic and research sectors but also presents enormous new opportunities to one of the fastest growing sectors of our economy, small business. H.R. 1858 permits these types of activities and supports the growth of all sectors of the economy, not in any way handicapping one sector at another's expense.

Promote the progress of science, education, and research

The success of our Nation's education and research systems is dependent upon the ability of educators and researchers to access data and information for multiple purposes. Scientific and research progress depends upon the ability to use public domain information, combine public and proprietary data to create new databases, and reuse existing data. Researchers typically create new knowledge by building upon the work of others. This practice, often described as, "standing upon the shoulders of giants" is the basis for our Nation's global leadership. Provisions in H.R. 1858 permit this practice—so fundamental to our educational system—to continue.

Use, reuse, recompilation of data and information also lead to new products and services in the public and private sectors. Entrepreneurs use the information resources in libraries, oftentimes government information, to develop new services of

value in our information economy. Overly broad protections in this arena would inhibit research and innovation by putting new economic and use barriers in front of researchers in a quickly moving global economy. Provisions in H.R. 1858 appropriately encourage scientific, educational, or research endeavors while at the same time, providing protection to the producers of databases from commercial free-riding of their products and services. As this debate continues, it is crucially important to understand how our communities use information and engage in research activities because these activities are not exercises in any capacity of commercial free-riding but, instead, are legitimate and legal practices.

Provide safeguards against monopolistic pricing

An increasing number of databases, including those developed with federal funding, are only available from a single producer. These "sole source" databases may contain historical data that cannot be recreated or the economics of recreating some datasets may not be feasible, such as generation of duplicate datasets from a myriad of satellite sensors or real-time financial information. Accessing these resources can prove problematic for members of the research and education communities. With only one point of access to a sole source database, the library has little recourse in accessing that resource. The publisher or producer of the database is not obligated to permit transformative uses, nor is there any leverage in negotiating the license to moderate costs or permit downstream activities. Provisions in H.R. 1858 provide reasonable terms and conditions for the user community and at the same time, give the producer economic benefits.

The library community is keenly aware of the problems associated with lack of competition in the journal arena where we are seeing skyrocketing costs. Some context may be helpful. Between 1986 and 1996, the consumer price index increased 44 percent. Over that same decade, the cost of monographs increased 62 percent. The price of health care increased 84 percent. And the cost of scholarly journals increased 148 percent—more than three times the rate of inflation and nearly twice the rate of growth in health care costs. And the price of subscriptions to online databases grew even more rapidly. The cost of information, especially scientific research, is climbing at a rate far beyond the means of buyers to pay. For example, serials spending in ARL libraries is 152% higher in 1998 than the decade before.

In an effort to resolve this expensive and unproductive predicament, the library community has initiated projects to inject competition and cost-based pricing into the marketplace. To be successful though, these efforts should not be thwarted by protectionist changes to copyright and intellectual property regimes. Instead, there should be, as demonstrated in provisions of H.R. 1858, a focus on stimulating innovation and competition. These provisions provide the owner of the database the assurance that there will be reasonable compensation for use of the database while ensuring that there are appropriate terms and conditions on database access for users.

A key indicator of our new global economy is the growing number of mergers and acquisitions. We have witnessed a significant amount of consolidation in the publishing arena within the last several years which will have a profound impact on our institutions and how our users access selected information resources in the future. This raises some cause for concern. For example, one proposed merger considered by Reed Elsevier and Wolters Kluwer foundered due to opposition from antitrust authorities in Europe and the United States. Although no formal complaints were filed by U.S. or European agencies, regulators did indicate their serious concerns with the proposal. Of interest to these deliberations are some of the discussions of the United States Department of Justice, Antitrust Division, which considered the implications of the proposed merger on U.S. interests and surfaced a significant amount of new data. One finding by Mark McCabe, formerly with the Antitrust Division, now Assistant Professor of Economic, Georgia Institute of Technology, is that, "journals sold by commercial publishers indicate that prices are indeed positively related to firm portfolio size, and that mergers result in significant price increases." As there is a steady contraction in the number of publishers which leads to diminished competition, we should be extremely careful in enacting new proposals which in any way could increase control over information resources. H.R. 1858 appropriately recognizes this concern by balancing the interests of users of databases with the needs of the publisher.

Finally, the U.S. Government is the largest producer of information. Recently, a number of factors have led to federal agencies outsourcing data activities to the private sector where, for example, private sector partners create and possibly maintain a federally-funded database for an agency. The number of public-private sector partnerships is growing and the private sector is becoming more involved in disseminating government data for agencies. Without appropriate safeguards, this government information could be subject to new protections and not available within the public

domain as now required by law. H.R. 1858 seeks to ensure that agencies do not permit this information to be captured by private sector entities, leading to a reduction in access and the robustness of the public domain. It may be useful to explore additional means to ensure that publicly funded information is accessible without more restrictions on use and reuse.

In closing Mr. Chairman, we fully support the narrow, targeted approach taken in H.R. 1858 to ensure that there are no negative or unintended consequences for the public and private sectors, including libraries, that properly rely on access to data and government works. There should be a careful balancing of interests to ensure that users and providers of information are able to continue with current practices while producers of databases receive new limited protections. Such balancing entails a focus on anti-competitive practices in the use of databases, not protection of facts or information. We thank you and the other Members of this Subcommittee for your leadership on these issues and look forward to working with you on this legislation.

ORGANIZATION BIOGRAPHIES

The American Library Association is a nonprofit educational organization of 57,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society.

The American Association of Law Libraries is a nonprofit educational organization with over 5,000 members dedicated to serving the legal information needs of legislators and other public officials, law professors, and students, attorneys, and members of the general public.

The Association of Research Libraries is an Association of 122 research libraries in North America. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service.

The Medical Library Association is an organization of over 3,800 individuals and 1,200 institutions in the health sciences information field. MLA members serve society by developing new information delivery systems, fostering educational and research programs for health sciences information professionals, and encouraging an enhanced public awareness of health care issues.

The Special Libraries Association is an international association representing the interests of nearly 15,000 information professionals in 60 countries. Special librarians are information resource experts who collect, analyze, evaluate, package and disseminate information to facilitate accurate decision-making in corporate, academic, and governmental settings. The Association offers a myriad of programs and services designed to help its members serve their customers more effectively and succeed in an increasingly challenging environment of information management and technology. SLA is committed to the professional growth and success of its membership.

Mr. TAUZIN. Thank you, very much. Mr. Chairman, this is déjà vu all over again. I am more and more convinced the Internet is just a high tech bookmobile rolling through America.

The next witness will be Mr. Lynn Henderson, president of Doane Agricultural Services Corporation.

STATEMENT OF LYNN O. HENDERSON, PRESIDENT, DOANE AGRICULTURAL SERVICES CORPORATION, ON BEHALF OF THE AGRICULTURAL PUBLISHERS ASSOCIATION

Mr. HENDERSON. Thank you, Chairman Tauzin and members of the subcommittee. I certainly appreciate the opportunity to testify today. I am president of Doane Agricultural Services Corporation, which for the last 80 years has been a leading provider of economic forecasting services, information, and computer software for farmers and ag related businesses.

Our radio program, Agri Talk, plays daily on 115 radio stations with over a million listeners. I am also speaking on behalf of the Agricultural Publishers Association, which is a coalition of mostly

small businesses who provide vital and timely information to the nearly 3 million farmers who make up the farm-related industries.

I am testifying today because H.R. 1858 does not protect us against most piracy. Our agricultural forecasts products, it is a database that is critical to farmers, particularly in today's low-price times like we are facing. Our economists collect volumes of raw data on acreage, production prices, and livestock from USDA and other government agencies. Then we add value by organizing, updating, and tailoring it specifically to assist farmers in how to profitably market their crops.

Without significant protection for the labor, time, and money involved here, we clearly will not have the resources to do that in the future. And yet under H.R. 1858 if an important part of the database, let's say the section on livestock only, is extracted by pirates, I won't be protected. I am only protected when the whole agricultural forecast database has been duplicated, and even then H.R. 1858 is not much protection.

This is a publication that we put out every year and it was pirated last year, and that is why I have taken particular interest in this issue. I found it on somebody else's Web site. Under H.R. 1858, if the pirate had just altered the guide and added a few small amounts of the data, they could have wiped out my return on my investment for the thousands of hours that our staff spends, the relationships that we have worked so hard to have with firms to have them supply us with their data, and the hundreds of thousands of dollars that we spend collecting and compiling the information.

I think small businesses are particularly threatened under H.R. 1858. As the many recent mergers in our industry indicate, the face of agri business is changing and the number of customers continue to shrink. Today we have licensing agreements to sell multiple copies of our products. Under H.R. 1858 as I understand it, it only protects sale to the public. They can buy one copy and, for example, our feed additive compendium, upload it on their Ethernet or e-mail it to their 5,000 employees, and with a click of a mouse, the publisher is out of business and has lost their market.

If I provide our databases as loss leaders so as to attract customers, H.R. 1858 does not provide any protection whatsoever. Just the other day a consortium of big businesses offered me a nominal amount for important parts of my inventory. They told me that they were going to give it away on the Web just to attract eyeballs to their site, and if we could not come to an agreement on the terms, they would just take my database because of the lack of protection that we currently have. Are we going back to the law of the jungle where there is no protection, small from big, victim from thief? I should hope not.

Further H.R. 1858 establishes protection in such a way I practically have to be bankrupt before I can seek it. Under this bill, I have to incur substantial damages threatening my ability to recover return. By not granting the right to sue and leaving us only to relying on FTC, should it ever get around to pursuing my case, most all publishers will neither be able to survive the piracy permitted by H.R. 1858 or attract investors to maintain or build our businesses.

As you can tell as a small business person, I do not feel that H.R. 1858 covers our needs, not only on the domestic but on the international front. I welcome any questions from the panel and would refer you to my written testimony.

[The prepared statement of Lynn O. Henderson follows:]

PREPARED STATEMENT OF LYNN O. HENDERSON, PRESIDENT, DOANE AGRICULTURAL SERVICES COMPANY ON BEHALF OF THE AGRICULTURAL PUBLISHERS ASSOCIATION

Chairman Tauzin and Members of the Subcommittee: Thank you for the opportunity to testify on H.R. 1858.

I am the President of Doane Agricultural Services Company, which for the last 80 years has been one of the leading providers of information, economic forecasts and computer software to the agricultural sectors. Our radio program *Agri Talk* is carried each day on 115 stations in the farm belt reaching nearly one million listeners. I am also speaking on behalf of the Agriculture Publishers Association, a coalition of mostly small businesses who provide vital and timely information to the nearly 3 million individuals who make up America's farming and farm-related industries.

Piracy comes in many forms, and is especially easy in this age of electronic communication. I'm testifying today because H.R. 1858 *does not* protect me against most piracy.

Our *Agricultural Forecast* product is a good example of a database critical to farmers. Our economists collect volumes of raw data on acreage, production prices, crops supply, and livestock from USDA and other government agencies. Then we add value by, organizing, updating and tailoring it specifically to assist farmers in how to profitably market their crops. Without protection for the significant labor, time and money involved here, we clearly will not have the resources to do this. And yet under H.R. 1858, if an important part of the database, most of the sector on live stock, for example, were extracted by pirates, I wouldn't be protected. H.R. 1858 only protects me when the whole agricultural forecast product has been duplicated.

And even then, H.R. 1858 is not much protection. I have already found Doane's *Agri Marketing Services Guide* for sale on some one else's web site. Under H.R. 1858, if the pirate had just altered the guide to add a small amount of data pirated from someone else, the pirate could have wiped out my return on the thousands of hours our staff spent, establishing relationships with firms so that they'd agree to participate, and the hundreds of thousands of dollars we spent collecting and compiling the information.

Small businesses are particularly threatened under H.R. 1858. Most agricultural publishers are small businesses. As the many recent mergers in this sector indicate, the face of agribusiness however is starting to look like a consortium of many businesses. Today we have licensing agreements to sell them multiple copies of our products. Under H.R. 1858, which only protects sale "to the public" they can buy just one copy of the Farm Chemical Handbook, upload it on their Ethernet e-mail it to the 5,000 best customers, and with the click of a mouse, deprive its publisher very important markets.

And, if I provide our databases for free as a loss leaders so as to attract customers, H.R. 1858 doesn't provide any protection at all. Just the other day, a big industry consortium offered me a nominal amount for important parts of my inventory. They told me that they were going to give it away on the web—just to attract eyeballs to their site and that if I didn't want the money, they would just take the databases. Are we going back to the law of the jungle where there is no protection, big from small, victim from thief, etc.???

H.R. 1858 also threatens our markets in the scientific research communities. Good farming, safe food, and finding markets for American agriculture depends on research. Good research and good science depend on our databases, such as the *Insect Control Guide* or the *Agricola* up to the minute database of all the latest technological and scientific developments, to name a few. Thus, both the non-profit and profit making educational research entities are important markets for us.

By exempting works used in the name of science, research, or education, H.R. 1858 not only severely harms our markets, but also jeopardizes the very research it worships. If we must give away our databases here, what revenue will support the making of the databases on which agriscience and research depend?

Finally, H.R. 1858 establishes protection in such a way I practically have to be bankrupt before I can seek it. Under this bill, I have to incur "substantial damages" threatening my ability to "recover a return".

By not granting a right to sue and leaving us only to rely on FTC, should it ever get around to pursuing our "case", most all agricultural publishers will neither be able to survive the piracy permitted in H.R. 1858 or attract investors necessary to maintain or build their businesses.

Frankly, under H.R. 1858 I think all I'll be doing is spending time and money trying to erase from the net even the *few* acts of piracy this bill prohibits. The extreme exception in H.R. 1858 grants to OSPs, seems to mean that they don't have to do any thing to clean up their airwaves even when notified of prohibited acts there. If they won't help, small businesses like agricultural publishers will clearly be undone.

Now, I am all for competition and the free market, but I want to meet my competitors in the marketplace, not see my product stolen and then used to undersell me by someone who's invested in nothing but a scanner. We would bring many of our printed services online if we had protection. Label changes in herbicides, for example, must be disseminated quickly for the safety of our farmers, their families and the consumer.

Today one third of the farm industry uses the Internet. Three years from now most will be online. If H.R. 1858 is the law by then, most of today's agricultural publishers won't be there. Pirates will be. They will make money of course, because under pricing us is easy when one doesn't have to spend any money developing the database in the first place and doesn't plan to spend any real money maintaining it. But will they make good databases for farmers? I'd hate to depend on the accuracy of a database on feed additive quality control information if it was not based on substantial investment in keeping it up-to-date and comprehensive.

However, no matter who's on the net, if H.R. 1858 becomes law, you probably won't find help exploring possible markets beyond our national borders. A European grain buyer planning his next move would benefit greatly from access to Doane's information services concerning American farm products. Although, today, we could expand our services via the Internet, we cannot realistically pursue this avenue under H.R. 1858. Last year's European Union directive gave European database producers protection, leaving US businesses—in the absence of adequate protection here—out in the cold. Today and even under this bill, Europeans could just copy our guides and undersell them to our potential customers abroad. We need legislation, which will help us protect and pursue new markets. People might not have immediately realized it, but meaningful protection for databases will help create new markets for our farmers as well.

If I may, Mr. Chairman, I would like to submit for the record a list of all 97 publications from the Agricultural Publishers Association, who I represent here today, as well as a letter from last year signed by all the major agricultural interest groups asking Congress to pass a strong bill to protect databases from piracy.

Thank you for inviting me to come here today to tell you of how database piracy is threatening all agricultural publishers and their consumers, the American farmers.

Mr. TAUZIN. Thank you very much, Mr. Henderson.

And now the gentleman that I welcomed in your absence, Mr. Gregory O'Brien, the chancellor of the University of New Orleans. Again, Mr. O'Brien, it is good to have a home boy here.

STATEMENT OF GREGORY M. O'BRIEN, CHANCELLOR, UNIVERSITY OF NEW ORLEANS, ON BEHALF OF NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, ASSOCIATION OF AMERICAN UNIVERSITIES, AND AMERICAN COUNCIL ON EDUCATION

Mr. O'BRIEN. Thank you, Chairman Tauzin. On behalf of the three associations that I represent, the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land Grant Colleges, we are pleased to testify on behalf of H.R. 1858.

Together these three associations represent over 1,500 colleges and universities. These colleges and universities conduct the preponderance of our Nation's academic research.

They produce most of our Nation's Ph.D.'s, as well as masters and professional students. They educate millions of undergraduate students each year. These institutions understand the need to protect databases, and they support legislation to address unfair competition and database piracy.

Indeed, universities and colleges often are creators of collections of information and therefore have a vested interest in protecting the authenticity and the integrity of these collections.

Let me state at the outset that I am not here as a legal scholar, a copyright attorney, nor an information expert, but as a university administrator concerned with maintaining the breadth and quality of our university research and educational programs. We appreciate the subcommittee's consideration of H.R. 1858.

We believe the bill offers an excellent starting point for addressing the database protection issue. The bill provides protection against database piracy while at the same time respecting our single core principle that we must maintain our traditional access to and use of data and information as the cornerstone of scientific and scholarly research, teaching, and learning.

The higher education associations believe it is imperative to preserve the constitutionally based premise of this Nation's information policy, that no one may own facts or information, only prevent the full, unfettered use of facts and information.

Mr. Rightmire referred to the Feist decision. That decision goes on to state that the raw facts in a compilation may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances progress of science and art. This policy has served the country well.

The United States stands at the forefront of learning, science, and technological advancement, and the Nation has benefited richly from its leadership in international economic competitiveness, life saving advances in medicine and health care, technological superiority in defense, and in a rich quality of life for all of our citizens.

We believe that the enlightened information policies of this Nation have played a significant role in sustaining the creativity and productivity of research and education programs that have led to these benefits.

Congress should be wary of any legislation that threatens the public domain status of facts and information because the importance of access for research and education. Indeed, for the effective functioning of our democratic society, congressional decisions about the proper scope of protection for compilations of information should emphasize caution and access to information.

Based on this important principle, there are two critical standards of any legislation to protect compilations of information should meet. First, protection should be targeted to deal with specifically identified wrongful conduct. Second, protection should be addressed to clearly define subject matter and to be limited to compilations as compilations and not to the facts or information contained therein.

Let me discuss H.R. 1858 in the context of these standards. First, any new protection should be targeted to deal with specifically wrongful conduct. H.R. 1858 does just that. It prohibits the dis-

semination to the public of a copy of a database in a manner that causes substantial competitive harm. This is a reasonable response to the concerns identified by those who seek added protection for their databases.

Second, H.R. 1858 is intended to protect a clearly defined class of databases and not the facts or the information contained in those databases. However, we do believe there could be some adjustments in the definition of databases to clarify the distinction between other works that may have certain characteristics of databases but should not be considered as databases under that definition.

For example, the definition does not expressly exclude works of nonfiction such as biographies and history articles that could be considered as collecting discrete items of information for the purpose of providing access to that information. We recommend that this definition be clarified so that such works would not be considered as compilations of information.

Let me emphasize that we do not seek a free ride on the work of others. As has been stated earlier, our institutions pay for databases and will continue to do so. Our primary concern is whether additional legal protection is necessary or justified. Overly broad legislation threatens the traditional educational and scientific activities which are essential to the missions of our institutions and the progress of our economy.

We believe the answer is legislation such as H.R. 1858 that offers protection against unfair competition and database piracy without jeopardizing the traditional principles of access to information.

We commend the committee for proceeding carefully to craft legislation targeted at solving the specific identified problem. To act more broadly would result in legislation with unintended consequences which would have a chilling effect on research collaboration, educational enrichment, and economic productivity. Thank you, Mr. Chairman.

[The prepared statement of Gregory M. O'Brien follows:]

PREPARED STATEMENT OF GREGORY O'BRIEN, CHANCELLOR, UNIVERSITY OF NEW ORLEANS, ON BEHALF OF THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE AMERICAN COUNCIL ON EDUCATION, AND THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES

I am Gregory O'Brien, Chancellor of the University of New Orleans. I appreciate this opportunity to testify before the Subcommittee on H.R. 1858, "Consumer and Investor Access to Information Act of 1999." My testimony is presented on behalf of the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges, which together represent over 1,500 colleges and universities. The colleges and universities that are members of these Associations conduct the preponderance of the nation's academic research, produce most of its Ph.D.s as well as Master's and professional students, and educate millions of undergraduates each year. These institutions understand the need to protect databases, and they support legislation targeted to address unfair competition and database piracy. Indeed, universities and colleges often are creators of collections of information and have a vested interest in protecting the authenticity and integrity of those collections.

Let me state at the outset that I am not here as legal scholar, copyright attorney, or information expert but as a university administrator concerned with maintaining the breadth and quality of our university research and education programs. We appreciate the Subcommittee's consideration of H.R. 1858. We believe the bill offers an excellent starting point for addressing the database protection issue. The bill provides protection against database piracy, while at the same time respecting our single core principle—that we must maintain our traditional access to and use of data

and information as the cornerstone of scientific and scholarly research, teaching and learning. The higher education associations believe it is imperative to preserve the Constitutionally based premise of this nation's information policy that no one may own facts or information or may prevent the full, unfettered use of facts and information. As the Supreme Court said in *Feist*, "all facts—scientific, historical, biographical, and news of the day... are part of the public domain available to every person." *Feist Pubs., Inc. v. Rural Telephone Service Co.* 499 U.S. 340, 348 (1991), quoting *Miller v. Universal City Studios, Inc.*, 650 F-2d 1365, 1368 (5th Cir. 1981). "[T]he raw facts [in a compilation] may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." 499 U.S. 340, 350 (1991).

This policy has served the country well. The United States stands at the forefront of learning, science and technological achievement, and the nation has benefited richly from this leadership in international economic competitiveness, lifesaving advances in medicine and health care, technological superiority in defense, and an enriched quality of life for our citizens. We believe that the enlightened information policies of this nation have played a significant role in sustaining the creativity and productivity of the research and education programs that led to these benefits. Congress should not enact any legislation that could threaten this fundamental principle that facts and information remain in the public domain. Because of the importance of access to data for research and education—indeed, for the effective functioning of a democratic society, Congressional decisions about the proper scope of protection for compilations of information should err on the side of caution and access to information.

Based on this principle of preserving access to and use of facts, we can identify two critical standards that any legislation to protect compilations of information should meet: First, protection should be targeted to deal with specifically identified wrongful conduct. Second, protection should be addressed to a clearly defined class of materials and should be limited to compilations as *compilations*, not the facts or the information *per se*.

In the following discussion, I first provide an overview of the basic academic activities that would be threatened by database legislation that is overly broad in its protective mantle. I then examine H.R. 1858 against the standards identified above.

I. The Academic Environment and Activities Potentially Impeded by Database Legislation.

The research and teaching missions of colleges and universities are fundamentally tied to information and the translation of information into knowledge; through the production, analysis, verification, interpretation, and dissemination of information, scientists and scholars expand the frontiers of knowledge and transmit that ever-expanding knowledge to colleagues and to students. The results of research are publicly disseminated through articles, books, workshops, conferences, and increasingly through digital networks as well. Research results so disseminated are used by other scientists and scholars—to build on, to critique, to re-examine and reinterpret. Through the give and take over what may be initially conflicting data or interpretations of data, new phenomena are understood and verified, and knowledge is advanced.

The process of translating data into knowledge requires the open exchange of information among allied scholars and critics alike. Increasingly, research is conducted in teams, often from several institutions. Data are drawn from multiple sources, recombined and merged with new data to produce data sets that may lead to new and unanticipated findings. Data sets vary from the results of a single experiment, captured in a table in a single journal article, to the vast databases of information compiled from meteorological remote sensing instruments, geographic information systems, particle accelerators, and systematic aggregations of research results to produce databases of genomic, chemical, and medical information, and much more.

Databases supporting research and scholarship are not limited to the sciences. Databases supporting work in the humanities and social sciences are proving increasingly essential to advancing knowledge in these disciplines. Specialized dictionaries, annotated bibliographies of worldwide research resources, census information, and compilations of text citations are just a few of the systematic compilations of information critical to humanistic and social science research.

In the academic community, databases are dynamic instruments; they are not only sources of information, but they themselves—or components of them—become ingredients in new products, both through the combination of multiple contemporaneous data sets to produce qualitatively new products, and through the re-analysis of prior data from new perspectives provided by new findings or new analytic tools.

A scientist may apply a formula developed from his or her research to a different set of data, yielding a different interpretation of those data; multidisciplinary researchers may combine components from physical, biological, chemical, and meteorological databases to understand the dynamics of ecological systems; social scientists may combine elements of demographic, economic, legal, and political databases in comparative analyses of national or regional populations worldwide.

Digital technologies are creating new analytic methods and tools at a staggering pace, turning yesterday's possibilities into breathtaking realities today. These breakthroughs have led to new discoveries in medicine, engineering, and many other fields, leading to the creation of entirely new commercial ventures and products. The future holds enormous possibilities for enhanced research collaboration, productivity, and economic development if researchers can rely on open communication and ready access to data.

Such an environment can only serve to enrich the education of students as well. Some of the best education is learning by doing and by discovering, and students are increasingly using databases to draw their own conclusions, duplicating the research process to learn through discovery under the guidance of faculty.

For all of these research and educational activities, faculty and students must be able to have open and easy access to compilations of data of all sizes, from single research results to large databases, and they must be able to work with these compilations—extracting, combining, and aggregating sets of data—to advance the frontiers of knowledge and educate students about those advances.

These academic uses of information do not require that all information be free; indeed, universities now pay substantial sums for commercial databases. But these uses do require sufficiently flexible conditions of use, conditions that can be stultified by a proprietary protection scheme that makes use, reuse, and recombination difficult and militates against the ability to exchange information with colleagues and students.

II. The Standards Against Which Legislation To Protect Compilations Should Be Judged

In general, the Associations share the view of the Administration, as expressed last year by the Department of Commerce, that “any [law to protect compilations and databases] should be predictable, simple, minimal, transparent and based on rough consensus.” Letter from Andrew J. Pincus, General Counsel, Department of Commerce, to Senator Patrick J. Leahy, August 4, 1998. In particular, we emphasize three important criteria.

First, the protection should be targeted to deal with specifically identified wrongful conduct. H.R. 1858 meets this criterion. The prohibition against dissemination to the public of a copy of a database in a manner that causes substantial competitive harm is a reasonable response to the threats identified by those who seek added protection for databases. The single clear theme we have heard throughout this debate, and the single clearest need we can identify, is the need to prevent pirates who copy databases and disseminate them as their own in a manner that destroys the market for the original. The case for additional protection has not been made. As we have said, Congress should err on the side of our traditional and highly successful policy of access to information.

Second, protection should be addressed to clearly defined subject matter. If the goal is to protect incentives for the creation of large databases that require extensive effort to develop and organize, the legislation should be crafted to apply to just such works. The risk of spillover into other types of works should be minimized. Further, it is essential that the legislation protect the compilations as *compilations*, not the facts or the information contained in the compilations *per se*. While this is a difficult line to draw, it is critical that it be drawn properly.

H.R. 1858 comes close to meeting this goal. However, we do believe there could be some adjustments to the definition of “databases” to clarify the distinction between other works that may have characteristics identified in that definition, but that should not, themselves, be considered databases. For example, an individual history book or scientific article might collect “discrete items of information” for the “purpose of providing access” to them. It would be unreasonable to contend, however, that such works should be considered “databases.”

I should emphasize that we do not seek a free ride on the work of others. Legal and technical rules already exist to provide substantial protection against such free riding. Our institutions pay for databases and intend to continue to pay for databases. The relevant question is whether additional legal protection is necessary or justified in light of the threat overly broad legislation poses to traditional educational and scientific activities. We believe the answer is legislation such as H.R.

1858 that offers protection against unfair competition and database piracy without jeopardizing access to information.

In seeking to preserve legitimate access to information, however, we do not argue that scientific, educational and research institutions should have the right to destroy the incentive to create a database by broadly disseminating that database to the public. We do not understand this to be permitted by the legislation, and would be happy to work with the Subcommittee to clarify this issue.

We commend the Commerce Committee and its Telecommunications Subcommittee for proceeding carefully to craft legislation targeted to solving a specific problem. To do otherwise could result in legislation with unintended consequences that could produce a chilling effect on research collaboration, educational enrichment, and economic productivity in the years ahead.

We appreciate the Subcommittee's leadership on this important issue. The higher education associations stand ready to work with you to support your efforts to achieve fair and balanced database legislation.

Mr. TAUZIN. Thank you, Mr. O'Brien.

Finally is Mr. Donald Baptiste, president and CEO of USADemocracy.com.

**STATEMENT OF DONALD BAPTISTE, PRESIDENT AND CEO,
USADEMOCRACY.COM**

Mr. BAPTISTE. Good morning, Mr. Chairman and members of the subcommittee. Thank you for the opportunity to testify before you on the important issues of database piracy and public access to information. This morning I would like to tell you about USADemocracy.com, how we use information and databases and also my concerns regarding inappropriate protection of database publishers that could inhibit the free flow of information.

USADemocracy.com is a free Internet service that proactively notifies subscribers of pending legislation, allows them to easily communicate their opinions to their representatives, and automatically tracks the results of that legislation.

During the development of that system, we had to choose where we were going to gather the data that we would use to populate our congressional database. We could have gathered that data internally, as it is all publicly available for free through a number of government and commercial sources.

However, we chose to purchase that information from a database publisher because it was the most cost- and time-efficient manner of gathering it. We bought the information not for the value of the information as it was free and publicly available, but for the value inherently and the ease of extracting that data into our own internal database.

The market determined the fair value of that database and the publisher was rewarded in their efforts in compiling it. I do have concerns regarding any legislation that would grant inappropriate protection to database publishers specifically on the use of public information. Inappropriate legislation could severely limit competition, artificially raise the cost of databases, and in some cases grant monopoly to a small number of firms.

We were fortunate that along with the option of gathering that data internally, there were a number of database publishers we could go to buy that database, thereby keeping the cost associated with that affordable through healthy competition.

How database piracy will be determined is also a concern of mine. All of the databases we looked at were substantially similar as would have been one internally as we are all using the same

public information. It will be extremely difficult to determine where an alleged database pirate acquired the information, as we are all dealing with the same general information.

Allowing the courts to decide this is not a viable option for a small startup. Just the threat of litigation will create an artificial barrier to entry to the small startup firms which have been the backbone of this Internet boom.

Any company raising capital to implement their ideas and concepts must disclose any current legal proceedings they are involved with as well as any potential legal problems down the road. If investors feel there will be a greater risk of legal proceedings due to inappropriate legislation, it will make the already difficult task of raising capital nearly impossible.

Therefore, Mr. Chairman, I ask you and the subcommittee to act cautiously to ensure that information continues to flow freely and unfettered to the companies and individuals that are driving this economy. Thank you for the privilege of testifying before you.

[The prepared statement of Donald Baptiste follows:]

PREPARED STATEMENT OF DON BAPTISTE, CEO, USADemOCRACY.COM

Good Morning Mr. Chairman and distinguished members of the Subcommittee, my name is Don Baptiste and I am the Chief Executive Officer of USADemocracy.com. I appreciate the opportunity to testify before the Subcommittee this morning on the important issues of database piracy and public access to information, I'll try to keep my remarks brief and to the point.

USADemocracy is a comprehensive Internet resource for people interested in politics and the legislative process. Our goals are to educate the American public as to the activities of their elected representatives on Capitol Hill and to provide a medium through which our subscribers can communicate with Congress electronically. Our company, like many other Internet companies, deals mainly in information. We provide information that is already in the public domain to our subscribers, at no cost to them, in a more usable format. Any legislation that extends proprietary protections to database publishers who use information in the public domain would make it extremely difficult to continue providing our service efficiently and at no cost.

While developing the software that runs USADemocracy.com we had to determine the best way to populate our database. There were many possible ways to obtain the information we needed. We could have called each Congressional office and asked a number of preset questions. We could have gone to each Congressional web page and "mined" the data. We could have gone to a number of commercial web sites that also use the same public information that we do and "mined" the data. We could have "mined" the data from any number of print publications that carry the same data that we do. Instead we simply purchased a database of Congressional information because it was more cost and time efficient than trying to gather it ourselves and because it was provided in an easily useable format. We purchased the database because there was value in its ease of use, not in the information itself.

In our case, the market determined the fair value of the database of information. If current copyright law is excessively strengthened, small businesses like ours could be subject to copyright infringement lawsuits for utilizing existing databases to gather public information. Furthermore, restrictive legislation would take the decision out of the hands of the market and place it in the hands of government regulators and the courts.

Restrictions on the free use of public information would also drive up the price of databases for companies like USADemocracy.com as there would be no threat of us compiling our own database. The options discussed earlier would no longer be available. A monopoly would be granted to the first firm to publish any public information. Even if we gathered the data legally, there are only so many ways to display data. Any format we choose would be "substantially the same" as everyone else's. Additionally, there would be no way of proving how a company obtained their data if it was already in the public domain. For a start-up company, letting the courts decide is not a viable alternative. The costs of potential litigation would prohibit companies from even attempting to enter a market.

Public information is in fact just that, public. Proprietary protections for database publishers would in essence bestow ownership of previously public information. Any party who chooses to create a database of information would then have ownership over that information. These protections could apply to all types of information from voting records and biographies of elected officials to batting averages and vital statistics about your favorite baseball players. No one owns a Congressman's voting record or Babe Ruth's lifetime batting average and no one should. This is public information that should be open and accessible to everyone.

Progress is based on the concept of taking existing creations and ideas and improving them. This concept is one of the foundations of our robust economy. Information is now more than ever the building block of innovation and if we stifle the flow of information then we will stifle growth and innovation in our society at large. Of utmost importance is giving people the ability to disseminate and utilize information so that they can make productive use of technological advancements like the Internet, now and in the future.

Mr. Chairman, we are very fortunate to live at a time where such great opportunity exists. I urge the Congress to be cautious while enacting legislation on access to information to ensure that this age of opportunity continues to flourish. Thank you for the privilege of testifying before you.

Mr. TAUZIN. Thank you very much.

We want to thank all of our witnesses. The Chair will now recognize himself for 5 minutes and members in order.

Let me first point out that you have laid out the conflict rather well before us. As you know, the 1991 Supreme Court case basically said that the sweat of the brow that went into the collection of a database is not copyrightable, and yet it may indeed deserve some protection.

Phyllis, you laid out the case for as tightly constructed a protection system as possible so that it is not overbroad and does not impinge upon the public's right to access their own information and other information and data.

Others of you, Mr. Henderson, Mr. Horbaczewski, argued for more broader protections as a Judiciary subcommittee has done, I think, all of the way to almost copyrighting non-copyrightable material today, and therein lies the conflict.

Mr. Pincus, you indicated that you thought that the bill's definition of protected databases may be too broad. Most of you, with rare exception, felt that Judiciary was too broad. You felt our Commerce mark was too broad. Why?

Mr. PINCUS. Well, it is really the interaction of two provisions of the bill, the definition of database and the definition of duplicate. Although it is true duplicate requires that the database be substantially the same, the definition of database says that—the last sentence, a discrete section of a databases that contains multiple discrete items of information may be treated as a database.

So our concern which we lay out in detail in that testimony is that database owners might argue that even though a tiny section was taken, that tiny section is actually a separate database under this definition and therefore is entitled to protection. So our concern is that that approach may actually lead to a broader scope of protection with respect to this element of the test than other tests which just say it is a chunk of the database.

Mr. TAUZIN. Are you suggesting that we narrow the definition in some respect? Do you have suggested language for us?

Mr. PINCUS. I guess our suggestion is that of the approaches that are out there, taking the database as one finds it and requiring that a substantial chunk be taken allows for more common sense

judicial examination of whether there is something that approached—

Mr. TAUZIN. I think that was a yes?

Mr. PINCUS. Yes, I guess so, Mr. Chairman.

Mr. TAUZIN. Obviously, Mr. Henderson and Mr. Horbaczewski would disagree and say that the protections are too limited already. We have also heard some discussion from them as to whether or not there ought to be a private right of action.

Mr. Baptiste indicated his concern about that. Obviously it is a jurisdictional concern, but considering adding a private right of action somewhere in this process does pose the problem Mr. Baptiste pointed out. Yahoo! I assume at this point in its development, Amazon.com and others, probably have some pretty good legal teams on board and probably they are not going to be terribly threatened when they get a letter threatening a lawsuit.

But what about the new entrant who doesn't have that legal team who gets that letter that says don't you dare do that, or we will sue the pants off you, the threats to the free, fair use of facts, of data in our society, does anyone want to hit that for me? Mr. Politano?

Mr. POLITANO. I am at AT&T and we are not a little tiny company; we are a little larger. And we get those threats and we are troubled by them because, No. 1, it puts a chilling effect on what we think that we can do.

No. 2, it leads to high litigation expenses and uncertainty. No. 3, we have a very difficult problem in educating our scientists and in educating our people what they can and cannot do.

Mr. TAUZIN. Mr. Politano, shouldn't Mr. Henderson have a right to go to court and say someone has stolen my creativity?

Mr. POLITANO. I think he should have a right.

Mr. TAUZIN. How can we do that and not create the kind of fear that Mr. Baptiste has pointed to?

Mr. POLITANO. I think Mr. Henderson does have a right, and I think that right already exists. He pointed out the marketing services guide. If someone actually took that and put it up on an Internet site, he would have a couple of claims against them under current law. We would have a copyright infringement claim. He might have a trademark infringement claim and perhaps a claim under section 43 of the Lanham Act.

I think there are plenty of weapons that a potential plaintiff can use, and I agree with Mr. Baptiste; and I just want to say that even a large company such as AT&T is chilled by overreaching legislation.

Mr. TAUZIN. And this is a first amendment area. Phyllis makes that case exceptionally well for Eagle Forum. This is an information society and a free speech society. Why would the administration want to create a new private right of action here in this new, very delicate area. Mr. Pincus.

Mr. PINCUS. That is really the only way that you are going to create the kind of climate that you need for investment. I think the way to deal with the problem of frivolous litigation is to have clear standards and standards that allow that breathing room so you are not slicing the onion so—

Mr. TAUZIN. My time is up. We are not just talking about frivolous litigation. We are talking about the chilling effect of litigation threats on small entrepreneurs or even big ones, but particularly the small ones, who don't have big legal staffs and who are going to be literally thwarted in their efforts to develop new services for America in this information age. Aren't you concerned about that?

Mr. PINCUS. We are concerned about it, and that is why we think that the standards of liability should be clear. The best protection is to spell out clearly in the statute what the lines are and then the entrepreneurs pay a little bit of money to the lawyers.

Mr. TAUZIN. Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

First of all, I would like to thank Mr. Oxley for his graciousness in conceding defeat in the 1999 free throws. Forty-six out of 50 is quite an achievement. It has to be noted that Mr. Oxley shot 47 out of 50 free throws last year. You can only do it once, and it has to be monitored by one of the personnel in the gym. Mr. Oxley had the highest score of the 20th century, and that will forever remain. Actually of the millennium, the highest score, and I want to congratulate you, Mr. Oxley, and we will begin a new millennium next year. You are the Mark McGwire of this century, and we very much appreciate your greatness.

Mr. Rightmire, at Yahoo! your corporation has spent considerable time and effort and money in compiling databases for use by consumers. These databases are obviously extremely valuable assets at Yahoo!, and Yahoo! Markets itself as a navigational guide to cyberspace.

Helping to organize facts floating around cyberspace is a considerable task, but is extremely useful to consumers. My question to you, Mr. Rightmire, is this: Why doesn't Yahoo! seek the same protections for its databases that Reed Elsevier is seeking? Why don't you want greater protection for all of the effort that you have put into creating Yahoo!'s databases?

Mr. RIGHTMIRE. I would preface my answer by saying through the exemption through part of the resource that we are providing to consumers, to a certain degree we will be protected. One of our primary assets is the database that you referred to, the navigational tool that allows people to find sites of interest on the Web. And through the exemption for that data, we will have that asset relatively protected.

Now, at the same time that is only part of our business, and the other portion that this bill begins to address is that of transforming information that we acquire from over 400 content providers. Through relationships with those 400, we acquire access to the lion's share of information that consumers find valuable on the Web. We take that data, we aggregate and integrate it and we present it to consumers in a way that allows them access to a much more easy-to-navigate way to information they have trouble finding elsewhere.

Without the provisions that this bill lays out, we would have a hard time playing the role that we play on that side of our business.

Mr. MARKEY. Thank you. Mr. Horbaczewski, will you comment on what Mr. Rightmire just said.

Mr. HORBACZEWSKI. I don't know how Yahoo! runs their business. We have a hard enough time running our own, but I do know that we have payrolls to meet and rent to pay and computer rental payments to meet, and it would be difficult to explain to all of those people that the check was not in the mail because the person who took the information without paying for it was either in a more glamorous line of business or had tenure or was too important to pay for it.

I can only assume that Yahoo! has not invested in the way that we have invested because it is—visiting sites and pulling things off is a different process.

I have also understood that browsers such as Yahoo! help people identify sites that contain information, they don't necessarily kick in the door and empty the silver closet and take all of the underlying data back, so I think we may be talking apples and oranges.

Mr. MARKEY. Mr. Black, can you help us to distinguish between these two?

Mr. BLACK. Through the Internet we are going through a tremendous exploration of business models and practices, and what works and what kind of businesses will operate in the future we don't really know. And that is part of the reason we are using caution in general.

I think MCI and Tim Casey talked about the use of databases and the backbone—it is not just the information floating along; it is basically part of the operation. I think we simply look at the reality right now, and I think the case for harm has not been made.

Is there some kind of chilling effect on the creation of databases and the answer is the opposite. databases are being created all over the place for all purposes. Now there may be some business models that in previously created databases that may need to adjust to that reality, but databases from a broad public standpoint are not being inhibited from being created for the public. I think that is a key factor to keep in mind.

Mr. MARKEY. Mr. Henderson?

Mr. HENDERSON. I could not disagree more heartedly with that comment about databases not being created. I can tell you in my case until this is resolved and until I can be assured that nobody can, just scanning it off into cyberspace my business can be protected, I put a halt on any further database development in my company; and it is at the detriment of not only my company but also the U.S. economy because we are sitting on a wealth of information that could help farmers sell crops and find better prices for their crops overseas because of this wonderful new tool, the Internet; and I don't want people to classify me as an anti-Internet person. I love it, but I want to make sure that the rules that are on it take care of everybody who creates things, are protected in this group.

I would like to make one other point and that is theft. I have young kids and I try to teach them not to steal, a penny, a dime, a dollar, \$5. How much are we talking here? That is why I want to get back to the substantial amount that is being taken. It is a real difficult issue, and that is a major concern I have here.

Mr. MARKEY. Thank you, Mr. Henderson. Every time you speak four people's heads go like this, and every time Mr. Black speaks,

heads go like this. It is going to be a fascinating hearing. Thank you.

Mr. TAUZIN. The Chair recognizes the vice chairman of the committee, Mr. Oxley, provided we end this syrupy mutual admiration society.

Mr. OXLEY. That will be easy.

Mr. Henderson, based on your testimony and your answers, do you support the Judiciary Committee version of the bill?

Mr. HENDERSON. Yes, sir.

Mr. OXLEY. Mr. Politano, your testimony indicated that AT&T creates these customized databases, targeted marketing lists and the like containing the pieces or parts of other databases that meet your specific business needs. Is that a common practice other than AT&T?

Mr. POLITANO. Yes. My understanding is that it is throughout the industry.

Mr. OXLEY. Do other companies use your database or parts of your database as a piece of another database that is in their business plan?

Mr. POLITANO. Occasionally by contract, but that is relatively rare because of privacy concerns we have.

Mr. OXLEY. Take us through how that would work in a practical way, the contractual agreement.

Mr. POLITANO. Well, what happens, and my experience has been that there are many databases out there and they are proprietary, is that AT&T will contract with the owners of these proprietary databases to either share the information that is on the database or to allow the database to work in a system, in a protocol, or in some aspect of an electronic commerce.

It is largely done by contract. There are some databases that are in the public domain that AT&T uses, but by and large it deals with entities that have proprietary information in databases, and they lend it to us or they sell it to us and we want it because it is reliable. We believe it is up to date, and we believe that it fits into our business practices.

Mr. OXLEY. Do you sell or lend to other folks from your database?

Mr. POLITANO. Occasionally we do. It is not a major aspect of our business, but sometimes we do, yes.

Mr. OXLEY. If you are already paying for that service, what is the problem?

Mr. POLITANO. That is the point. We don't really see that there is a problem. We think there is adequate protection now regarding the way that the databases are used, and we certainly encourage the claims that are made under current law, either under contract law or trade secret law or occasionally under unfair competition trademark infringement law.

Mr. OXLEY. But Mr. Henderson obviously would not agree with that assessment. Let's pass the microphone back to him, and what is your perspective on what Mr. Politano just talked about?

Mr. HENDERSON. First off, I would like to state that I believe that the marketplace should be free; and I welcome competition. I just want others to go through the process that we have to go through to get things to a finished product.

Relative to working out contracts with Internet providers, heavens, that is what we do. We just don't want people to take it and put it on their site or take little pieces of it and a little piece from somebody else. In the old days you could work out a contractual arrangement and everything was taken care of, but right now that is not the situation.

Mr. OXLEY. Ms. Schlafly, is it your view that the Judiciary Committee bill would limit people's access to their own medical records?

Ms. SCHLAFLY. Yes, that is my view and I do not think that some entity, corporation, should have a proprietary ownership of my visits to my doctor, what he prescribes and diagnoses and make it difficult or costly for me to get out of there. So I think that the medical records which are very valuable, commercially so valuable in the present environment, have to be available; and I don't think that somebody should own them and be able to charge for them.

Mr. OXLEY. Thank you. Mr. Baptiste, can you take us through your ability to collect data, how the bill in the Judiciary Committee would affect data as well as how this particular bill would affect it?

Mr. BAPTISTE. I don't believe that the bill in front of Commerce would really affect us gathering data because we could do it through numerous sources that are available in D.C. or continue just purchasing the data through a database.

The concern I would have if broader legislation was passed is that we would not have the ability to do it ourselves, that we would be forced to purchase that data, thereby artificially driving the price up.

Mr. OXLEY. Are you referring to the Judiciary Committee version?

Mr. BAPTISTE. Not specifically. Just any broader legislation. The Judiciary Committee has much stricter regulations of data.

Mr. OXLEY. Thank you, Mr. Chairman.

Mr. TAUZIN. The gentleman from Ohio, Mr. Sawyer, is recognized.

Mr. SAWYER. Thank you, Mr. Chairman. Mr. Pincus, I apologize for not being here when you were offering your testimony, but am I correct that you believe that the fair-use protections provide greater protection for information users than would be suggested by the bill? And can you give us an example, if that is the case?

Mr. PINCUS. Yes, I can give you two examples. We have a number laid out in the testimony. The fair-use provision in the bill is limited to three specified purposes: scientific, educational or research uses, and copyright fair use has been held to encompass a broader range of purposes.

And this provision, which is one of Section 103(d) in the bill, provides an exemption for liability for duplication, and it is not clear that that would extend throughout the entire chain of dissemination of information, and we are obviously concerned that we make sure that there is not a cutoff of fair use in the distribution chain.

Mr. SAWYER. Let me ask you, you talked about access to civil redress and use for clear standards, and in your written testimony you talked about the difficulty with the European database directive. Am I correct that—you said that the administration opposes reciprocity, per se, and that you would simply go to national treat-

ment terms? Does that answer the concerns that Mr. Horbaczewski raised in terms of his worry about the failure to have some harmonization with European standards?

Mr. PINCUS. Let me answer the question by explaining how. We think that the process here should be that we should develop a database law that we think is appropriate for us domestically, and then we will obviously have to have a conversation with the Europeans about whether they are willing to declare that approach similar enough to extend protection under their law to U.S. database producers. But we have our trade arsenal if it should come to that and we would certainly use those tools.

Mr. SAWYER. What a polite way to say it. Should I gather from that then that while you don't support pure reciprocity, that the whole notion of negotiated mutual recognition is possible, and looking particularly at clear standards for functional equivalents would make some sense if it is carefully negotiated?

Mr. PINCUS. I think so, Congressman, although I think our view is that the Europeans have taken a very different approach than in either this committee's bill or the Judiciary Committee's bill. And we think it is more important to have that domestic discussion and come to closure on what we think domestically the right solution is and not worry so much how the Europeans will react to that until we come to closure on that and then have a discussion with them.

We think that it is likely that the range of things that we are considering or that are likely to be enacted, we would have a pretty strong case for convincing them that they should—it is close enough to protect American database users under their approach.

Mr. SAWYER. When you talk about clear standards in the case of frivolous or potentially chilling lawsuits, can you expand on that a little bit for us?

Mr. PINCUS. One of the things that the chairman pointed out, one concern that we have, which is how do you define a protected database, and that is one issue we think is worth further examination.

Another question is the term question. We think that there should be a term that necessitates some other things, when does the term start and some protections against artificially extending it. We think those things should be spelled out with some clarity.

The other element that has to be proven to establish a violation under the bill is the competition test and that test has two prongs. We are comfortable with the first prong, the substantial harm, essentially. But the second step, "significantly threatens the opportunity to recover return on investment," we are worried may create a lot of uncertainty about the person who gets the letters that the chairman referred to, saying, "cease or desist or we are going to file a lawsuit," may have no idea whether that test is being met or not, and we think that for that element substantial harm may be enough to weed out cases that are too frivolous and there is de minimus harm to get into court without having this other test that is going to create a lot of uncertainty and worry.

Mr. SAWYER. Are there others who would like to respond to that observation?

Mr. HORBACZEWSKI. There are not too many of us here who actually create databases. We have our payroll to meet every week. We have our rent to pay every month, and the paths of diplomacy are notoriously slow, so that it would comfort us to avoid gratuitous conflicts with Europe which is, after all, a large market, rather than hope in the fullness of time that these things would be worked out at a higher level by people who do not necessarily always listen to us.

The other fact is that free trade is a good thing and a global economy is what we are looking at and unnecessary disharmony between the laws of measured developed economic areas are bad in themselves, so we would hope that whatever comes out of this is something that is more conducive to a single world market rather than severe disruptions when you cross borders.

Mr. SAWYER. Thank you. Mr. Chairman, may I have a little more flexibility.

Mr. TAUZIN. Without objection, I will extend the Congressman's time a minute.

Mr. SAWYER. Mr. Neal.

Mr. NEAL. I was an advisor to the U.S. delegation at the WIPO treaty in December 1996. I think it is noteworthy that at that time WIPO made a decision not to pursue a database. It was seen as perhaps the environment wasn't ready to deal with that.

Second, I am on a new international committee which is monitoring database legislation internationally, and it is noteworthy that in many countries this has not progressed, even in the European Union, and I think we need to understand why that has not happened. I think the context of developing a database legislation that works for us is the right strategy.

Mr. SAWYER. Mr. Chairman, may I read into the record a question that Mr. Green left? I am not sure that I need an answer. He could not stay.

Mr. TAUZIN. Before you do that, Mr. O'Brien, you were trying to jump into this.

Mr. O'BRIEN. We seem to get lost. H.R. 1858 provides a very good beginning step. It is cautious in its limitation, but it does provide the protections that we need; and I think the statement about starting here is right because in part our traditions about access to information are fundamental in our Constitution. That is not true everywhere in the world.

Mr. TAUZIN. The gentleman would like to read a question.

Mr. SAWYER. Congressman Green of Texas wanted to pose the question: Does H.R. 1858 go far enough to address the concerns of groups like the National Association of Realtors, who believe that this legislation does not go far enough to protect their databases from commercial exploitation?

Mr. TAUZIN. Yes, we have had a good discussion of that and we will keep the record open after this hearing for the submission of additional questions. For example, if you feel that you would like to supplement your testimony with some other examples, other information, you are free to do so.

Mr. SAWYER. Mr. Chairman, I thank the Chair very much.

Mr. TAUZIN. The Chair now yields to the gentleman from Virginia, Mr. Boucher, for a round of questions.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I want to commend you for having this timely hearing and saying that I also am very supportive of the approach that has been put forward by the Chairman of the Full Committee, Mr. Bliley, in his legislation that is cosponsored by the balance of the leadership of the Full Committee and the subcommittee.

Having had the opportunity to examine this issue, both in the House Judiciary Committee and also in this committee, I find more attractive the more narrow and targeted approach that is offered by Chairman Bliley than the broader and problematic approach that is embodied in Mr. Coble's legislation. In fact, I really have some questions whether we need to legislate in this area at all, at least for the time being.

Let me begin my questions by asking of any members of the panel who would like to comment on this why it might not be a better approach to examine in somewhat greater detail the potential that the State common law cause of action for misappropriation, as perhaps it might be better developed over time in case law, could not be relied upon to provide the protection to database creators that it is the goal of these two separate items of legislation to provide?

Who would like to talk a little bit about the status of the common law misappropriation cause of action as it might be applied to this need?

Mr. TAUZIN. The gentleman from Louisiana, Mr. O'Brien, is excused from answering. We are not a common law State.

Mr. BOUCHER. Well, if he would like to comment on how the civil law might address this, maybe we could incorporate that cause of action into the Uniform Commercial Code.

I am very interested in the extent to which we might be able to rely upon the remedies that are already a part of the law to address this need. Obviously to the extent we do that, we avoid the risk of unintended consequences of legislating. Mr. Black, would you care to comment on this for starters?

Mr. BLACK. Mr. Boucher, State law obviously varies greatly, and I would not want to get into a great deal of discussion on any particular jurisdiction, but your point underlying it is that the Internet is new; these claims for meeting redress are fairly new; and it may be very appropriate to, in fact, allow our Federal system to work its will, get some experimentation, to find out what is the range of business models, what are the nature of the problems, whether or not some of the companies affected have an ability to adjust, whether various kinds of legal protection which have been referenced here today are, in fact, able to be modified or to grow into adequate remedies.

I think our support of the bill here is clear. It is on the record, but I think our position clearly is if there is a bill, this is the bill we would support, but some forbearance and some examination of other options, I think, is certainly justifiable.

Mr. BOUCHER. Mr. Horbaczewski?

Mr. HORBACZEWSKI. Yes, I would like to point out that the option of State law misappropriation in the current legal climate is not available. There was a case, the NBA versus Motorola case, where the court, taking account of the copyright policy as enunciated by

the Feist case, really truncated New York misappropriation law and left a very narrow exception for State misappropriation law which covers hot news only.

At the moment, there is a single Federal principle at work here which is superior to everything else which is the court's judgment in Feist that only creativity should be protected by copyright. Unless there is a competing Federal principle, unless there is a Federal recognition that interstate commerce requires the protection of investments in databases, there is—there is no room—

Mr. BOUCHER. Mr. Horbaczewski, I am not talking about a Federal cause of action in this case but whether or not State law and the traditional cause of action for misappropriation might provide a remedy. I gather that we have had one decision, and I think that was by a Federal court that held that in a particular case the NBA was a party to that lawsuit, that there was not a factual framework that would justify application of the misappropriation cause of action.

But to my knowledge, that is the only litigation that we have had that begins to address this subject, and I am wondering if another consensus might be derived if enough cases are pursued at the State level.

Mr. CASEY, would you care to comment on that?

Mr. CASEY. Yes, I would. In fact, I think if you look at trade dress law, the Supreme Court has spoken on the issue of State misappropriation law quite a few times, and in the *Sears v. Stiffel* case and the *Comco v. Daybright* case and the *Batono Boat* case which is a lot more recent, and it said very clearly that States have the right to set misappropriation laws as long as they do not conflict with patent or copyright laws.

And the problem with the New York case is that it conflicted with copyright law. So as long as the State does not go too far so as to usurp the protection granted by the Federal Government, it is more than free to set the laws regarding misappropriation.

And if the States have not done so, it is the States' issue, and many States have done so and there are laws available in those States that the database owners can take advantage of. They just have chosen not to do so, and they are looking for Federal protection to make up for that, and I don't know if that is necessarily the right way to go.

Mr. TAUZIN. The Chair will extend the gentleman's time. I want to put on the table the gentleman's discussion with the question of predictability. In this fast-moving age, does in fact the gentleman's remedy of letting the courts in common law and civil jurisdictions work it out fit? The Chair yields back to the gentleman.

Mr. BOUCHER. I thank the chairman very much for that observation. What I would like to do is move to another subject matter. I am basically putting this notion on the table whether or not we might be able to rely on an existing cause of action.

Mr. TAUZIN. Would the gentleman yield. I would very much appreciate it, we are going to be looking at suggestions for some kind of cause of action here. I would deeply appreciate if those that have an inclination to do so think about this and write us or include some new testimony.

What is the answer to his question? Can the common law right satisfy this answer? Civil law, for example, other jurisdictions, the code, that most of us have adopted in commercial law, the common commercial code, will it satisfy it somewhere? Is it predictable enough for us to wade through all of the procedural fights over whether the venue is established in this or that case and whether or not it is properly structured? Or do we need in this bill somewhere to decide on whether or not there ought to be some sort of civil cause of action? I yield back to my friend. We will keep the record open 30 days.

Mr. BOUCHER. I thank the chairman very much for that.

A second question that I have—and I would pose this to anyone who would care to respond—relates to whether or not as a part of the Bliley legislation, should we decide to enact that, we need to address the liability of online service providers in those instances where third parties use their facilities either to post or to transmit material that would be found to be in violation of the Bliley standard.

We did this in the last Congress with respect to copyrighted material, and those rules are very clear. But Chairman Bliley's bill is not a copyright bill. And so my first question I would pose is whether or not in the minds of our panelists the principles announced in the last Congress with regard to that set of liabilities would be applicable to conduct under Chairman Bliley's bill? I think the answer is no. You may have a different opinion.

If the answer is no and we would need to address that issue separately, would there be general support for simply incorporating the principles that we adopted in the last Congress with regard to copyright and appending that to the new standards that are set for database protections in Chairman Bliley's measure? Mr. Casey.

Mr. CASEY. Well, when we met in 1995, we first talked about the need for protecting service providers from copyright legislation. And as you know, intellectual property protection often operates in a vacuum that is oblivious to the consequences of wherever that protection might occur. And that is what happened when the administration originally introduced the bill. The white paper and the bills associated with that related to WIPO copyright protection, and it is the same thing here with respect to other legislation. It doesn't take into account all of the consequences.

The difference, though, between the copyright bill, the Digital Millennium Copyright Act, and this particular case is that the scope of the affected parties is much broader. Whereas you could point to certain activities on the Internet such as storing material on a server or storing material within your computer before you looked at a Web site that created problems related to reproductions under the copyright act or derivations under the copyright act, you have a different set of rules that apply to these databases.

And you have many, many more things incorporated into how the databases are used. It is not just the Internet service providers that are making use of the databases, but it is the users themselves. It is the application programs that are running on top of the Internet. It is the protocols that stand behind the Internet and that operate completely independent of the service providers.

So there are many more aspects that are incorporated. So to attempt to take the whole exemption and notice and take down structure of the whole DMCA perhaps is going too far, but there are some applications where exemption is a proper way to go about dealing with this particular issue, to make sure that there is no question at all that certain viable databases are completely carved out and left alone from any form of protection so that we do not hinder that form of our commerce.

Mr. BOUCHER. So I gather that the answer is if we enact the Bli-ley legislation, we should have a provision that addresses the liability of online service providers, conduit providers, and others in the stream of distribution whose facilities might be used by third parties to post illicit material. Is that correct?

Mr. TAUZIN. I believe that is in our bill.

Mr. POLITANO. Section 106 (a) begins to address that, and I think it is a good idea that is in there because essentially AT&T is a pipe or conduit.

Mr. BOUCHER. Let me ask this question: To the extent that it is reflected in the legislation, how effective is that provision? And should we simply enact it as it stands or is it in need of modification to meet other needs?

Mr. CASEY. I think it could be expanded considerably, although it is a very, very good start. But it needs to take into account more than just the service provider activities in order to provide a full and complete exemption that will be necessary in order to make sure that the Internet continues to operate as it presently does. And I would be happy to work with the committee to derive the right language for that.

Mr. BOUCHER. The House Judiciary Committee in addressing that issue added a provision that speaks only to the liability of conduit providers and does not address the general liability of other people in the chain of distribution. It doesn't address Internet access providers and Web site operators and bulletin board operators.

I am wondering if there is a general sense that if we legislate in that area, that we ought to be somewhat more comprehensive and address not just conduit providers but the other providers as well.

Mr. CASEY. Yes, I would agree that we do need to be.

Mr. BOUCHER. Thank you, Mr. Chairman. I appreciate the extra time.

Mr. TAUZIN. The Chair will yield additional time to any other member. The Chair recognizes himself quickly.

Mr. Pincus, what is your view of that? Should that liability protection be expanded to include others in the pipe?

Mr. PINCUS. We have not actually taken a position on the OSP question as it applies here. I think we want to study it carefully. There are some kinds of databases, the databases that Mr. Black referred to, that are used for the running of the Internet that we obviously want to carve out completely regardless of who uses them, and the bill does that.

And I think we want to see what kind of OSP-like people there are that have to be protected, but we have not yet engaged in that exercise.

Mr. TAUZIN. Use that 30 days wisely and communicate to us. Mr. Baptiste?

Mr. BAPTISTE. Yes. If comprehensive protection is not granted to online service providers and basically the conduit of the information that is housed on Web sites, it would create another barrier to entry for startups because when we went to go and host our site or get online service, they would say, what are you doing, is there any additional liability that I will be taking on because of your actions that I may not be aware of at all.

Mr. TAUZIN. Would you go as far as Mr. Casey and Mr. Boucher have suggested, expanding it to bulletin boards, et cetera?

Mr. BAPTISTE. I think comprehensive protections need to be in place to make sure that we have free access to the services we need to run a business.

Mr. TAUZIN. Mr. Horbaczewski.

Mr. HORBACZEWSKI. Since I seem to be one of the only two representatives of the people who make them instead of take them—

Mr. TAUZIN. Please be aware that the chairman did invite others. You are the only two brave souls that walked in here.

Mr. HORBACZEWSKI. The attitude expressed toward OSP liability reminds me of the old song, I just put them up, who cares where they come down, that is not my department.

But from the point of view of creator of databases, the notice and take down protection is absolutely essential to us because that is the only way to get effective remedies for a pirated database that goes up on the Internet.

Frankly in exchange for that, we are happy to give up immunity from liability to online service providers even if it might be more than they technically actually need. And so I would encourage the committee to encourage the OSP language as close to the Digital Millennium Copyright Act as possible.

Mr. TAUZIN. Let me point out while Mr. Casey is preparing to respond, section 106 does have the broad language. It covers any provider of telecom services or information services, but it has a qualifier if such provider did not initially place the database that is the subject of the violation on a system or network controlled by such provider or operator. So it is limited in that regard. It would take language to expand it if we wanted to do that.

Mr. Casey is recognized.

Mr. CASEY. As actually one of the initial developers of the idea for notice and take down in legislation for the copyright bill, the reason that it worked there and the reason why notice and take down may not work here is because in the copyright context what is copyrightable is very well set out.

We have a lot of traditional case law that establishes what is subject to copyright protection. The problem that we have in the database context, a database can be anything. It can be three words; it can be a thousand words. It can be a collection of a small amount of information or a large amount of information.

It is really up to the person who produces that set of information to decide what that database is going to be. And the definitions that we have of databases are very broad. They don't have qualitative or quantitative restrictions on them.

So in order to have notice and take down, the problem you run into is that under that system the person who receives the notice doesn't bother to investigate or look into why they received the notice; they simply take the information down.

So you can have in the absence of very strong rules regarding exactly when you can be sent a notice regarding what kind of database infringement, you could have an equally chilling effect where every time you put something up, you get a notice and off it comes. I don't know if that is the right approach we want to have.

So if we are going to do that, we need to be careful in terms of what types of databases exactly can be subject to the protections.

Mr. TAUZIN. Mr. Neal?

Mr. NEAL. Citizens of this country very often depend on their libraries for access to electronic databases. And a lot of that use is governed by license agreements that we sign with the publishers. And it is noteworthy in response to Congressman Boucher's original question that contract law is State-based.

And so I think there is a relevance there to the question that you originally raised in terms of how libraries behave and how we serve our users.

Mr. TAUZIN. And a final thought, we have chosen not to engage in this legislation with language dealing with false or fraudulent databases, and I would like your thoughts on that. Should there be or should we engage in that exercise in this legislation or not? Your comments as you use this 30 days to advise us. Mr. O'Brien?

Mr. O'BRIEN. Perhaps a general comment again. I think the strength of H.R. 1858 is that it is fairly cautious in an area where there is an explosion of new approaches. One of the concerns that we have is in the academy, and much of what we develop in scientific research, takes manipulating information from a previous database and putting a new form of analysis on it, and I think the approach in H.R. 1858 provides the caution and the protection, but it does not go so far as to have the chilling effect on scientific inquiry.

Mr. TAUZIN. Thank you. Mr. Markey?

Mr. MARKEY. Just one quick question again just for Mr. Pincus. If you could help me to focus in on the fair-use question and the administration's perspective. There are obviously going to be many circumstances where people will reuse information in databases that ought to come under some legal rubric analogous to the concept of fair use in copyright. Does the administration support adding this concept into our database legislation as an explicit provision governing permitted uses of databases?

Mr. PINCUS. Absolutely. We think that it is very important that in whatever database legislation is finally enacted there be a fair-use provision that is at least as broad as the copyright fair-use provision, and it may be appropriate for it to be broader in certain ways.

Mr. MARKEY. Does the Judiciary Committee version of this legislation contain a provision which you believe covers this subject adequately or would you like additional refinement of that?

Mr. PINCUS. When I testified before the subcommittee of the Judiciary Committee, we had some concerns about the Judiciary Committee formulation. But as the bill was reported to the full

committee, those concerns were addressed. The language was changed, and so we think that language does mirror or take up, make sure that the same protection is there as in the copyright world.

Mr. MARKEY. Could you do better?

Mr. PINCUS. Well, you can always do better. That is why we are here. The question is if you do that, what are you doing on the investment incentive side, and that is the question of how that balance has to be struck.

Mr. MARKEY. Thank you.

Mr. TAUZIN. Thank you, Mr. Markey. Obviously this is an exercise in finding the right balance. You have illuminated our thought a great deal, and we thank you. I will give you a chance if you have any final thoughts. Ms. Schlafly?

Ms. SCHLAFLY. I would just like to point out that it is important that you go slow in this expanding area of the Internet, but the Judiciary Committee bill, 354, is really a dramatic change. It is an attempt to get around the Feist decision and other decisions. It is an attempt to create a copyright in databases without using the word copyright, to create a property right, intellectual property and databases when it is not intellectual property; and that is really quite dramatic. I would hope that the Congress would follow your leadership in going in a very cautious way in this whole expanding area.

Mr. TAUZIN. The staff commented if you ever need a job on the staff, you have defined our jurisdictional arguments very well. Mr. Black.

Mr. BLACK. One brief comment on the private right of action issue. In that regard, we actually toyed with is this something that maybe we can support and some limited concern about FTC. I think what we wind up looking at and what is going on in Congress with Y2K, the same problems well articulated in there in terms of frivolous and uncertainty, creating a lot of concern throughout, given the nature of this area. I think we wind up saying we really shouldn't go there yet.

Mr. TAUZIN. Mr. Horbaczewski?

Mr. HORBACZEWSKI. Mr. Chairman, as a representative of commercial makers, I just beg the committee to move quickly on this issue. There are investments that have to be made; there are lead times and plans that we have suffered under considerable uncertainty for the last 3 years. I would hope that this would not drag on until the next session.

Mr. TAUZIN. I would agree with you. I think predictability is very important. Mr. Neal.

Mr. NEAL. I think the issue of fair use is very critical in the finalization of this bill. I think it is very important to look very critically at the fair-use provisions in H.R. 354. I still think there is some important work there.

Mr. TAUZIN. You are preaching to the choir there. This committee has a huge interest in fair use.

Let me say finally again that we are faced on this committee with the extraordinary implications of the Internet on our lives and how we deal with questions of intellectual property rights and fair use and the flow of information. This committee generally errs on

the side of the free flow of information. It errs on the side of working out in the marketplace rather than government dictating the terms. It generally errs on the side of protecting this free speech society which we think has done so much for freeing the world of tyrants, and we appreciate your thoughts on how to make this cut and balance as carefully as we can.

Phyllis, you mentioned, we are deeply concerned about property rights, and balancing that is critical. We will do our best with your help. Use the 30 days wisely. Please come back to us. We thank you. The hearing stands adjourned.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission is pleased to have this opportunity to offer this Statement concerning H.R. 1858, the Consumer and Investor Access to Information Act of 1999.¹ The Commission is responding to Subcommittee Chairman Tauzin's June 11, 1999 letter, requesting agency views on Title I of H.R. 1858, as an official request of a Congressional Subcommittee.²

H.R. 1858 has four primary objectives: (1) protecting substantial private investments in collecting and organizing original databases from certain forms of free-riding by sellers and distributors of duplicate databases; (2) permitting competition by those who independently collect and organize rival databases; (3) preserving access to information contained in databases for legitimate journalistic, law enforcement, scientific, educational and research purposes; and (4) denying protection to database owners who seek to misuse such protection for anticompetitive purposes.

Databases play an important role in promoting innovation and advancing knowledge in the information age. Further, the emergence of new digital technologies has greatly increased the accessibility and usefulness of many databases. However, these same technologies have also created opportunities for free-riding and misuse. The resulting public policy challenge is to ensure that the law continues to provide adequate incentives for database owners both to produce databases and to allow sufficient access to those databases and the information that they contain. This challenge is further complicated by the ongoing nature of innovation, which requires both protecting the incentives of those who are first to compile a particular type of database and preserving the opportunities of those who seek to transform existing databases into new, useful compilations or other products.

The Commission has experience formulating policy and remedies involving similar kinds of challenges. During the Commission's 1995 Hearings on Global and Innovation-Based Competition, industry, academia, and legal practitioners provided extensive testimony concerning the intersection of competition, intellectual property, and innovation policy. More recently, in cases such as *In re Softsearch Holdings, Inc.*,³ *In re Automatic Data Processing, Inc.*,⁴ and *In re Provident Cos., Inc.*,⁵ the Commission has considered the potentially anticompetitive effects of the increased market power that can result from consolidation among database owners and vendors.

Drawing from such experiences, the Commission provided comments on an earlier proposal for legislative protection of databases in letters to the Chairman and the

¹ Although this Statement makes general reference to "H.R. 1858," it is directed solely to Title I of the Bill. Title II of the Bill is directed to securities market information.

² See Commission Rule 4.11(b), 16 C.F.R. § 4.11(b).

³ 5 Trade Reg. Rep. (CCH) ¶24,171 (F.T.C. July 28, 1997) (consent decree) (as condition to merger of only two databases with certain oil production data, merged firm required to lease data at reasonable rates to establish a competitor as a second source).

⁴ 5 Trade Reg. Rep. (CCH) ¶24,006 (F.T.C. March 27, 1996) (consent decree) (as condition to settling charges that the defendant's acquisition of a rival provider of information services to salvage yards was intended to monopolize various markets within the salvage yard information management industry, defendant required to divest the computer systems and salvage yard parts trading network it acquired in order to establish a competitor as a second source).

⁵ No. 991-0101, 64 Fed. Reg. 27,991 (F.T.C. May 24, 1999) (proposed consent decree, subject to public comment) (as condition to merger of two disability insurance companies, merged firm would be required to continue to submit insurance data to an independent entity responsible for aggregating and disseminating industry-wide actuarial information, with the goal of ensuring that adequate data would be available to existing competitors and to new entrants).

Ranking Member of the House Committee on Commerce last fall.⁶ In those letters, the Commission stated that "[a]dditional legal protections for databases may well be warranted, especially in light of the ease of piracy of some databases." At the same time, the Commission highlighted several "areas of concern that may warrant further study," particularly regarding possible unintended, deleterious effects on competition and innovation that could arise from broad or ambiguous database protection legislation.

This Statement derives from the same considerations that informed the Commission's letters last year. It first provides a brief overview of H.R. 1858. It then summarizes the general issues of intellectual property and competition policy and the specific concerns raised by the Commission last year. The Statement then highlights several respects in which H.R. 1858 appears responsive to those concerns. It also, however, identifies several possible problems and ambiguities with the Bill that may warrant further examination. Finally, the Statement addresses the proposal in H.R. 1858 to assign enforcement responsibility to the Commission and notes the significant new burden it would place on the Commission's resources.

I. OVERVIEW OF H.R. 1858

H.R. 1858 is designed to provide additional legal protections to databases that are not entitled to protection under copyright law following the Supreme Court's decision in *Feist Publications v. Rural Telephone Services*,⁷ which abolished "sweat of the brow" copyright protection for non-creative, factual compilations. Although H.R. 1858 is based on a misappropriation model,⁸ the Bill addresses core issues similar to those that arise in the context of intellectual property policy, as well as antitrust policy. These issues involve how best to protect both the ability of initial innovators to realize returns on their investments in developing a database and the ability of follow-on innovators to access databases to serve as building blocks for ongoing innovation competition.

The Bill defines a database as follows:

"a collection of discrete items of information that have been collected and organized in a single place, or in such a way as to be accessible through a single source, through the investment of substantial monetary or other resources, for the purpose of providing access to those discrete items of information by the users of the database. However, a discrete section of a database that contains multiple discrete items of information may also be treated as a database."⁹

"Information" is defined as including any intangible material capable of being thus collected and organized, except for "works of authorship."¹⁰

The Bill generally prohibits the selling or distributing to the public in commerce of a "duplicate" database "in competition with" an original database.¹¹ To be a "duplicate," the second database must be "substantially the same" as the original, and must have been made by extracting information from the original.¹² To be "in competition with" the original, the second database must "displace[] substantial sales or licenses of the original" and "significantly threaten[] the opportunity to recover a return on the investment" therein.¹³

This prohibition is subject to an exception for certain specified "permitted acts,"¹⁴ similar to the fair use defense in existing copyright law,¹⁵ and to exclusions that reserve to the public domain government databases and databases required by law,

⁶ Identical letters from Federal Trade Commission to House Committee on Commerce Chairman Tom Bliley and Ranking Member John D. Dingell, dated September 28, 1998. The letter to Chairman Bliley is attached.

⁷ 499 U.S. 340 (1991).

⁸ The Supreme Court has described the tort of misappropriation as taking material that has been acquired as the result of organization and the expenditure of labor, skill, and money, and then appropriating that material and selling it as one's own. *International News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918). Although state law varies, a plaintiff asserting a misappropriation claim has generally been required to prove five elements: (i) the plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the availability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be threatened. *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997).

⁹ H.R. 1858, § 101(1).

¹⁰ *Id.*, § 101(3).

¹¹ *Id.*, § 102.

¹² *Id.*, § 101(2).

¹³ *Id.*, § 101(5).

¹⁴ *Id.*, § 103.

¹⁵ 17 U.S.C. § 107.

databases related to Internet communications, computer programs, individual facts and other individual intangibles, and telecommunications subscriber list information.¹⁶ H.R. 1858 also exempts from liability telecommunications and information services and facilities providers who act only as conduits for the publication of duplicate databases.¹⁷ In a provision that appears to have its origins in patent misuse and copyright misuse caselaw, H.R. 1858 denies database protection to those who "misuse" it.¹⁸

As to enforcement, the Bill vests what the Commission understands to be exclusive jurisdiction in the Commission to enforce, implement by rule-making, and seek remedies for violations of its basic prohibition.¹⁹ The Bill also calls upon the Commission to report to Congress on its effects within three years.²⁰ Subject to a limited preemption of inconsistent State law,²¹ the Bill preserves Federal and State antitrust, intellectual property, communications, and contract law.²²

II. THE BACKGROUND TO THIS STATEMENT: INTELLECTUAL PROPERTY AND ANTITRUST POLICY AND THE COMMISSION'S COMMENTS ON PRIOR PROPOSED DATABASE PROTECTION LEGISLATION

As noted above, H.R. 1858 raises core issues of how to protect both investments in databases and access to databases similar to those at the intersection between intellectual property and antitrust policy. It is well recognized that despite the apparent tension between the antitrust and intellectual property laws, the two bodies of law share the common purpose of promoting innovation and enhancing consumer welfare.²³ Intellectual property law provides incentives for first-generation innovation by protecting innovators from unfair free-riding. Antitrust law recognizes that certain misuses of intellectual property rights may harm competition by, for example, permitting a monopolist to leverage its market power from the market covered by the patent or copyright into other markets, or to foreclose a competitor's or second-generation innovator's access to an important input.²⁴

H.R. 1858 presents issues about how to strike this delicate balance. As the Commission stated in its letters last year, a legislative remedy that effectively and accurately targets free-riders on databases appears desirable. Databases play an integral role in many facets of our economy, and collecting and organizing factual data is often an expensive and complex process. Free-riding by those who merely copy and resell or give away existing databases may reduce incentives for database providers to create new databases or to introduce existing databases in new media that can more effectively deliver more information to consumers. As recent cases such as *ProCD v. Zeidenberg*²⁵ and *Warren Publishing v. Microdos Data Inc.*²⁶ show, the proliferation of digital technologies has rapidly reduced the costs and difficulty associated with copying and distributing vast amounts of data, thereby facilitating free-riding. Although it may be too early to tell, current protections and remedies for database misappropriation, such as those available under contract and copyright law, may be inadequate.

In crafting legislation to protect the incentives of first-generation database producers, however, it is important to keep in mind the need to preserve opportunities and incentives for follow-on innovators, who may need access to the initial innova-

¹⁶ H.R. 1858, § 104. The exclusion of protection for databases required for Internet communications is essential to maintain the open networking practices that have facilitated the dramatic growth of electronic commerce in recent years. Computer programs may be protected by copyright, and otherwise protectable databases are not denied protection merely because they are included in computer programs. Telecommunications subscriber list information remains subject to FCC regulation under the Communications Act of 1934.

¹⁷ H.R. 1858, § 106(a).

¹⁸ *Id.*, § 106(b).

¹⁹ *Id.*, § 107.

²⁰ *Id.*, § 108.

²¹ *Id.*, § 105(b).

²² *Id.*, § 105(a), (c), (d).

²³ *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990); United States Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* § 1.0 (1995).

²⁴ See generally ANTITRUST LAW DEVELOPMENTS (FOURTH) at 282-85, 953-81 (1997).

²⁵ 86 F.3d 1447 (7th Cir. 1996) (holding that the defendant's copying of the contents of a CD-ROM database of 3,000 telephone directories and resale of it in an online format violated the licensing agreement accompanying the CD-ROM).

²⁶ 115 F.3d 1509 (11th Cir.) (*en banc*, cert. denied, 522 U.S. 963 (1997)) (holding that the defendant's copying of a cable system directory and reselling of it in a software format did not constitute a copyright violation because of the uncreative nature of the directory).

tion for use as a stepping stone.²⁷ Last year, the Commission expressed several concerns regarding the potential effects on competition of the database protection legislation then proposed, Title V of H.R. 2281 (the "Collections of Information Antipiracy Act"). The Commission highlighted the following dangers inherent in ambiguous language that could be read to preclude certain reasonable uses of existing databases to produce new products or services of value to consumers:

- **15-Year Term.** The 1998 bill limited the civil and criminal liability that it created to a term of 15 years from the date of "the investment of resources that qualified the portion of the [database] for protection under this chapter that is extracted or used." The Commission questioned whether 15 years was too long a term, given that information technology product cycles are typically short and misappropriation law has typically protected only investment in gathering "hot," i.e., short-term valuable, information.²⁸ The Commission also highlighted the uncertainties involved, particularly for a potential defendant, in attempting to apply any fixed term that runs from the point of "investment of resources" in a database, given that such investment is often ongoing.
- **Substantiality of Duplication.** The 1998 bill generally prohibited the extraction of "all or a substantial part, measured either quantitatively or qualitatively, of a collection of information . . . so as to cause harm to the actual or potential market for that other person . . ." The Commission highlighted the vagueness of a "quantitatively or qualitatively . . . substantial" test, and the chilling effect its uncertainty could have on a potential defendant. The Commission suggested that copyright precedent could not properly be applied by analogy, since such precedent is premised on the facts/expression dichotomy that is unique to copyright, typically looking for copying of expression that minimally "exceeds that necessary to disseminate the facts,"²⁹ or making stylistic judgments³⁰ that are alien to non-expressive collections of data.
- **Potential Competition.** The 1998 bill proposed to protect claimants of database protection against competition by duplicators not only in markets actually exploited by the claimant before entry by the duplicator, but also in "potential market[s]" that the claimant specifically planned to or might typically be expected to exploit in the future. The Commission highlighted ambiguities in this provision which could have a chilling effect on follow-on users, and noted that it appeared to provide more protection for databases than is available for works protected by existing copyright and misappropriation laws. Most importantly, the Commission expressed concern that by effectively enabling a database owner to exclude others from entering a secondary market without even entering such a market itself, the 1998 bill could conflict with a fundamental shared policy of intellectual property and antitrust policy: encouraging "the creation of transformative works."³¹
- **Single-Source Databases and Anticompetitive Misuse of Database Protection.** The Commission highlighted the "increased potential for anticompetitive conduct where there exists only a monopoly source for a particular type of information." The Commission noted the risk that database protections that entrench such monopolies may facilitate such anticompetitive practices as charging supracompetitive prices, restricting output, leveraging market power into other markets and denying essential inputs of information to competitors.³² The Commission cautioned that "antitrust law cannot alleviate all of the potential competitive problems associated with sole-source databases," since antitrust law

²⁷ See generally *Federal Trade Commission Staff*, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE, vol. I, ch. 6 (May 1996).

²⁸ See, e.g., *National Basketball*, 105 F.3d at 845 ("the surviving 'hot-news' INS-like claim is limited to cases where [inter alia] the information is time-sensitive").

²⁹ See, e.g., *Harper & Row Pub., Inc. v. National Enter.*, 471 U.S. 539, 564 (1985); *Salinger v. Random House*, 811 F.2d 90, 98 (2d Cir. 1987); see also *Iowa State Univ. Research Found. Inc. v. American Broadcasting Co.*, 621 F.2d 57, 61-62 (2d Cir. 1980) (use involving 8% of a videotape held to be substantial).

³⁰ See, e.g., *New Era Pubs. Int'l v. Carol Pub. Group*, 904 F.2d 152, 158 (2d Cir. 1990).

³¹ *Luther R. Campbell, aka Luke Skywalker v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (finding a transformative work to be a fair use under copyright law); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 38, cmt. c, at 412-13 (noting general limitation of misappropriation law to the originator's primary market).

³² Sole source databases have been the subject of substantial litigation concerning allegations of anticompetitive conduct by a monopolist. In its 1998 letters, the Commission cited two examples involving telephone directories: *Great Western Directories v. Southwestern Bell Tel. Co.*, 63 F.3d 1378 (5th Cir. 1995), modified, 74 F.3d 613 (1996), and *Direct Media Corp. v. Camden Tel. and Telegraph Co.*, 989 F. Supp. 1211 (S.D. Ga. 1997).

permits certain uses of lawfully acquired monopoly power and the essential facilities doctrine of antitrust law has been limited in its application thus far.³³

The Commission's letters last year concluded by suggesting three key areas in which the 1998 bill might be improved:

- (1) limiting the term of protection to less than 15 years and precluding perpetual protection for databases that are maintained on an ongoing basis;
- (2) defining more clearly the degree of copying required to trigger liability; and
- (3) excluding "potential competition" protection and/or strengthening "fair use" type defenses.

III. THE RESPONSIVENESS OF H.R. 1858 TO THE COMMISSION'S CONCERNS

H.R. 1858 differs significantly from the former H.R. 2281. Although the Commission notes several concerns with H.R. 1858 in the next Section, the Bill appears responsive to several of the Commission's original concerns.

(a) *Substantiality of Duplication.* Instead of asking whether a qualitatively or quantitatively substantial amount of data has been extracted from the original database, H.R. 1858 asks whether the two databases are "substantially the same."³⁴ No formulation appears possible that would exclude an element of judgment, but this new formulation appears clearer than that of the 1998 bill, and reduces the risk that data, as distinct from the database as a whole, will be protected.

The Bill further provides that "a discrete section of a database that contains multiple discrete items of information may also be treated as a database."³⁵ This provision also raises issues of judgment: how many is "multiple"? The closest the Bill comes to answering that question is elsewhere in its definition of "database," in which it requires that a database reflect "the investment of substantial monetary or other resources." If this is interpreted as requiring a reasonable common sense determination of substantiality, small sections of databases that lack real independent value will be excluded. Thus, the Bill appears to require that the alleged "database" be both (i) discrete and (ii) substantial in terms of what went into it. Furthermore, the "discrete section" provision does not mandate that such a section be deemed a database; instead, it "may" be treated as such. If this is interpreted to allow room for reasonable judgment as to whether the section is ultimately best characterized as a database as opposed to a mere extract, it appears that over-protection of minor elements of a database can be avoided.

(b) *Potential Competition.* The Bill does not expressly protect database creators with respect to markets that they might potentially enter, and requires that the duplicate database "displace[] substantial sales or licenses of the database."³⁶ That which does not yet exist is not normally said to be "displaced." Accordingly, this provision appears to require that there actually be "sales or licenses" of the original database in the market in which the two compete before the duplicate competes therein. In this respect, H.R. 1858 appears fully responsive to the concerns voiced by the Commission last year.

(c) *Single-Source Databases and Anticompetitive Misuse of Database Protection.* H.R. 1858 addresses the monopoly and misuse issues raised by the Commission last year in Section 106(b). Consistent with the general policy that factual databases should not be protected more than copyrighted and patented works, this provision looks to copyright and patent misuse precedent as a potential guide.³⁷ It also specifically addresses issues of monopolistic pricing and output limitations on sole source databases,³⁸ leveraging of monopoly power into new markets,³⁹ and denial of essential facilities.⁴⁰ In these respects, it appears highly responsive to the Commission's concerns. However, Section 106(b) also raises several novel issues of interpretation, discussed in the next Section, which may give rise to uncertainty and litigation.

³³ For discussion of the essential facilities doctrine, see, e.g., *MCI Commun. Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891 (1983). For extensive discussion of whether, when, and how to mandate access to competitively significant inputs, see Federal Trade Commission Staff, *ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE*, vol. I, ch. 9 (May 1996).

³⁴ H.R. 1858, § 101(2).

³⁵ *Id.*, § 101(1).

³⁶ *Id.*, § 101(5)(A).

³⁷ *Id.*, § 106(b)(6).

³⁸ *Id.*, § 106(b)(2).

³⁹ *Id.*, § 106(b)(3).

⁴⁰ *Id.*, § 106(b)(4).

IV. SUBSTANTIVE ISSUES ARISING UNDER H.R. 1858

In searching for an appropriate balance between protection and access to stimulate both first- and second-generation database production and use, the substantive provisions of the Bill (Sections 101 to 106) make several choices and employ several concepts that may warrant further study. The principal areas that appear likely to give rise to concerns or ambiguities are noted below:

(a) *Term of Protection.* H.R. 1858 contains no term limit to database protection. This absence eliminates the ambiguities noted by the Commission in the case of ongoing database maintenance,⁴¹ but heightens concerns regarding possible perpetual protection. If protection under the Bill were indeed perpetual, databases would in a sense be more protected than copyrighted or patented innovation, and the balance between protection and competition would be tilted against competition.

On the other hand, certain other terms, discussed further below, might operate to limit the term of protection as a practical matter. As the Commission noted in its 1998 letters, the common law of misappropriation has generally limited protection to relatively short terms despite the lack of a statutory term limit.⁴² The "in competition with" requirement of Section 101(5) of H.R. 1858 limits protection to that necessary to prevent a "significant[] threat [to] the opportunity to recover a return on the investment in the collecting or organizing of the duplicated database." Under this provision, it appears that once a database creator that has already recovered its "return on investment," it is no longer entitled to the protection afforded by H.R. 1858.⁴³ Similarly, the misuse defense of Section 106(b), which, for sole source databases, may effectively condition protection on *reasonable* licensing or sale terms,⁴⁴ might provide grounds for limiting protection of old databases. Nonetheless, as drafted, the Bill provides no clear term limitation to protection on which a potential defendant could readily rely.

The perpetual protection danger and the issue of whether some form of safe harbor can be constructed to protect those seeking to duplicate old databases may merit further study.

(b) *Section 101(3): Exclusion of Collections of "Works of Authorship" from Protection.* Section 101(3) defines "information" as excluding "works of authorship," and thereby excludes collections of works of authorship from the Bill's database protection regime. This provision appears ambiguous as to whether the phrase "works of authorship" is intended to incorporate by reference caselaw under the Copyright Act, 17 U.S.C. § 102. It would be useful to clarify this ambiguity, and also to clarify the purpose of this exclusion.⁴⁵

(c) *Section 101(5): The "In Competition With" Requirement.* As noted above, the requirement in H.R. 1858 that a duplicate be "in competition with" the original database to give rise to potential liability appears responsive to the Commission's concerns about prior proposals that might have protected database owners with respect to markets that they have yet to enter. The requirement that "the opportunity to recover a return on the investment in the collection or organizing of the duplicated database" be "significantly threaten[ed]"⁴⁶ also appears consistent with the underlying policy goals: the purpose of protection is to provide an appropriate incentive for database creation, not opportunities for monopoly profits over and above those necessary to stimulate production.

The more difficult issue, which may merit further study, is what level of return should be protected. The insertion of the word "reasonable" before "return" may be appropriate as a start to encourage those administering the Bill to develop stand-

⁴¹ A similar ambiguity may remain: Section 109, the effective date provision, provides that the Bill applies to the sale and distribution after its enactment of a database collected and organized thereafter. Whether databases initially created before the effective date but updated thereafter will be grandfathered is unclear.

⁴² See *supra*, note 28.

⁴³ As noted below, determining what constitutes a "return on investment" within Section 101(5)(B) will require interpretation and judgment.

⁴⁴ See H.R. 1858, § 106(b)(2).

⁴⁵ Under existing copyright law, no such distinction is made between compilations of works of authorship and other compilations. For each, *Feist* denies protection based on the "sweat of the brow," but there may be protection if the work involved in compilation meets the statutory requirement of originality. See, e.g., *Publications Int'l Ltd. v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996) ("The creative energies that an author may independently devote to the arrangement or compilation of facts may warrant copyright protection for that particular compilation. This also extends to the compilation of preexisting materials that is the work product of others. There is no dilution of the originality requirement, for a compilation's originality flows from the efforts of 'industrious collection' by its author.") (citations omitted). See also 17 U.S.C. § 101 ("The term 'compilation' includes collective works.").

⁴⁶ H.R. 1858, § 101(5)(B).

ards and precedents regarding what level of return is reasonable and can be expected. Precedents and principles from the utility regulation context could be consulted in this regard.⁴⁷

(d) *Sections 101(6) and 104(a): Government Databases.* Following the lead of the Copyright Act,⁴⁸ the Bill appropriately avoids creating private rights that would take government-created or government-funded information and databases out of the public domain. At the same time, the Bill recognizes that private investment in compilations that include substantial government data may be worthy of protection. In Section 104(a)(3), the Bill also helpfully preserves the ability of government entities to minimize uncertainty by establishing specific rules to govern specific databases by law or by contract. It is not readily apparent why the exclusion of government information from database protection is generally limited (under the present Bill as under the Copyright Act) to federal government information; as a matter of general policy, it appears desirable to keep state, local and foreign government-created information in the public domain as well.

Under Section 104(a)(2), as under Section 105 of the Copyright Act, the most difficult issue likely to arise is the severance issue: when and how should private investment in a database containing predominantly government information be compensated? Under the Copyright Act, the copyright holder must establish "substantial similarity between those elements [excluding governmental data and organization], and only those elements, that provide copyrightability to the allegedly infringed compilation."⁴⁹ The federal courts of appeals are currently split on the application of this test to a single factual issue: the incorporation into competing databases of West Publishing Company's star pagination from its database of judicial opinions.⁵⁰ This and similar issues may be expected to arise under H.R. 1858.

(e) *Section 103: Permitted Acts.* Section 103 appears intended to be the Bill's equivalent to the fair use defense in copyright. Unlike Section 107 of the Copyright Act, however, Section 103 limits its permitted acts to four specific enumerations. This poses a danger that additional valuable transformative uses that might emerge in the new information economy and cannot currently be specifically anticipated might be stifled. A broader provision along the lines of Section 107 of the Copyright Act that would provide a general defense for substantially transformative uses appears to merit serious consideration;⁵¹ such a provision could use the current enumeration in Section 103 or a similar enumeration as a non-exclusive starting point.

In addition, several aspects of the specific subsections of Section 103 raise questions. Section 103(a) usefully clarifies that the independent creation of an identical database is not prohibited.

The law enforcement exception in Section 103(c) appears plainly appropriate with respect to government officers, agents or employees. The interpretation of the phrase "lawfully authorized investigative, protective, or intelligence activities" is, however, unclear. Is it intended to be narrowly limited to governmental action for the purpose of preventing, detecting or prosecuting crime? Or does it encompass a broader array of activities, such as disseminating information to the public on the whereabouts of convicted or alleged violent sexual offenders, commercial sale of pri-

⁴⁷ Similar criteria have been used in the regulated utility context. Experience in that context indicates that determining what is a reasonable return on investment requires judgments concerning the appropriateness of the utility's valuation of its assets, appropriate rates of depreciation and the appropriate rate of return to compensate for the level of business risk in the market concerned. Since *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), in which the Supreme Court described the rate-setting process as one of "pragmatic adjustments," *id.*, at 602, and "balancing of the investor and the consumer interests," *id.*, at 603, courts have generally been highly deferential to regulators in this area, recognizing that "[t]he economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989).

⁴⁸ See 17 U.S.C. § 105.

⁴⁹ *Matthew Bender & Co., Inc. v. Hyperlaw, Inc.*, 158 F.3d 693, 704 (2d Cir. 1998) (citation and quotation marks omitted), cert. denied, 522 U.S. 3732 (1999).

⁵⁰ Compare *id.* (finding insufficient similarity and denying infringement) with *West Pub. Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987); see also *Oasis Pub. Co. v. West Pub. Co.*, 924 F. Supp. 918, 922-25 (D. Minn. 1996) (maintaining that the Eighth Circuit case remains good law after *Feist*).

⁵¹ The Copyright Act provision cannot provide a complete model for the Bill, since it builds into the affirmative fair use defense considerations of substantiality of copying and displacement of sales of the copyrighted work that have their analogs in Sections 101 and 102 of the Bill. However, its open-ended approach, citing a non-exclusive list of permissible "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," 17 U.S.C. § 107, enables courts to focus on the underlying policy of "balancing the need to provide individuals sufficient incentives to create public works with the public's interest in the dissemination of information," *Hustler Magazine Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986), rather than focusing on specific categories.

vate intelligence information, or dissemination by private entities of information received from law enforcement officials?⁵²

Data gathering and dissemination in many of these contexts raises significant privacy and, in some cases, First Amendment concerns. For example, in *United Reporting Pub. Corp. v. California Highway Patrol*,⁵³ the Ninth Circuit declared unconstitutional a California law⁵⁴ restricting the permitted uses of arrestee identity and address information provided by law enforcement agencies to non-commercial uses (plus media reporting). The case is now pending before the Supreme Court.⁵⁵ The effects of Section 103(c) on such First Amendment and privacy issues appear to merit further study.

The limitation of Section 103(d)'s exemption for "scientific, educational or research uses" to uses that are not "part of a consistent pattern engaged in for the purpose of direct commercial competition" with the database creator also gives rise to a potentially troublesome ambiguity: it is not clear how the undefined term "direct commercial competition" compares with the "in competition with" element of the basic prohibition, which, as discussed above, appears limited (as suggested in the Commission's 1998 letters) to actual (as distinct from potential) competition. Unless there is a specific policy goal to be served by using a different term, it would be helpful to simplify matters by using the same term in both sections.

Similarly, whereas the basic prohibition applies to "sell[ing] or distribut[ion],"⁵⁶ Section 103(d) refers instead to "duplicat[ion]" as the exempted act. This exemption could be read literally as valueless—it exempts an activity, mere duplication, that is not prohibited—leaving scientific, educational and research users of databases without an equivalent to the fair use protection that they enjoy with respect to copyrighted materials.⁵⁷ Clarity would be better served, and the danger of chilling legitimate scientific, educational and research activities would be lessened, by specifying the circumstances in which the prohibited acts—selling and distributing—are exempted.

(g) *Section 106(b): Misuse Defense.* As discussed above, the misuse defense created by Section 106(b) appears responsive to concerns expressed by the Commission last year regarding potential anticompetitive uses of database protection. The policy concerns underlying antitrust law suggest that misuse defenses should be no less available in response to database protection claims than they are in response to copyright and patent infringement claims. In addition, the equitable principle traditionally underlying misuse defenses, the "unclean hands" doctrine,⁵⁸ suggests that the defense could be used to deny protection to database creators who misuse their databases in other ways, such as denying consumers access to personal information about themselves contained on the database.

Section 106(b)(6) assists in the interpretation of the misuse provision as a whole by directing attention to patent and copyright misuse precedents. In addition, three of the factors identified by the Bill as relevant to a determination of misuse—the reasonableness of sale or licensing terms for sole source databases,⁵⁹ tying of database licensing or sale with other products or services,⁶⁰ and prevention of access to necessary information⁶¹—correspond to three established concerns of antitrust policy identified in the Commission's letters last year: monopolistic pricing and output limitation, leveraging of monopoly power, and denial of access to essential facilities. These provisions are far from self-executing: for example, the question of what licensing or sale terms are "reasonable" under Section 106(b)(2) raises issues similar to those discussed above in relation to Section 101(5)(B)'s "return on investment"

⁵² For example, Section 6254(f)(3) of the California Government Code requires that law enforcement agencies publish upon request "the current address of every individual arrested by the agency and the current address of the victim of a crime, where the register declares under penalties of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . ." Does Section 103(c) exempt from liability private entities who receive databases under this provision and then publish them, or is the exception limited to law enforcement officials? Also, is the law enforcement officials' compliance with the California statute itself a "lawfully authorized investigative, protective, or intelligence activity[y]"?

⁵³ 146 F.3d 1133 (9th Cir. 1998).

⁵⁴ Cal. Gov. Code § 6254(f)(3), *supra*, note 52.

⁵⁵ See *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 119 S. Ct. 901 (1999) (granting a writ of *certiorari* to review the Ninth Circuit's decision).

⁵⁶ H.R. 1858, § 102.

⁵⁷ See, e.g., 17 U.S.C. § 107's inclusion of the duplication and distribution of "multiple copies for classroom use" within its partial enumeration of fair uses.

⁵⁸ See, e.g., *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 792 (5th Cir. 1999).

⁵⁹ H.R. 1858, § 106(b)(2).

⁶⁰ *Id.*, § 106(b)(3).

⁶¹ *Id.*, § 106(b)(4).

criterion. But caselaw exists in most of these areas that might be useful in developing appropriate principles to guide application of these provisions.⁶²

In other respects, however, the misuse provision appears novel and potentially ambiguous. First, its subsections merely list factors to be considered in making the ultimate determination of whether "misuse" has occurred. "Misuse" itself is not defined, and the intent of Section 106(b)(6)'s instruction to consider copyright and patent misuse doctrine to "the extent to which [it] may appropriately be extended to the case or controversy" is unclear. It may be useful to clarify whether it is intended as an open-ended delegation to consider whether databases should be more or less protected than copyrights or patents and to adjust misuse precedents from those contexts accordingly, or whether the intention is to mandate consistency with those precedents unless specific factual issues render them inapplicable in the particular case. If the former, a determination of "misuse" threatens to become highly subjective: the whole point of the basic prohibition is to create a degree of exclusivity that the database creator can exploit for profit, but how much exploitation is too much? If the latter, significant distinctions between the misappropriation-style database rule and the intellectual property regimes of patent and copyright law may be neglected. For example, the filing of an infringement action can never be misuse under patent law precedent, while the filing of database protection lawsuits that assert claims that cannot be readily verified at the Patent and Trademark Office (since databases do not have to be registered) could be a highly effective and anticompetitive way of erecting barriers to entry in the database industry.

The role of the six enumerated factors is also unclear. Read literally, Section 106(b) consigns them to be considered "among other factors" in determining the ultimate issue of misuse, but can any one of them suffice alone? For example, can perfectly lawful "technological measures" taken to prevent unlawful copying, which then have the side-effect of frustrating permitted research or news media uses, constitute "misuse" pursuant to Section 106(b)(1), or does the term "misuse" itself entail some notion of wrong-doing?⁶³ By its nature, an assertion of database protection may well raise barriers to entry in a relevant database market; under what circumstances might the "manner of asserting" data protection rights amount to misuse pursuant to Section 106(b)(5)?

Also, when must the misuse occur? Is the determination to be made in the individual case, *i.e.*, whether the database protection claimant has injured the alleged violator by misuse, or over the whole course of the claimant's conduct, such that, for example, improper frustration of the ability of researchers to engage in permitted acts could result in forfeiture of protection as against all-comers, including direct commercial competitors? The latter alternative, which may be suggested by the text of Section 106(b)(1), could potentially provide an effective incentive to ensure access to databases for non-profit and other permitted users who might not themselves be in a position to complain of misuse or risk litigation. Existing copyright and patent misuse doctrine generally denies all enforcement against infringement while misuse persists, but allows the intellectual property owner to revive its rights by purging itself of the misuse.⁶⁴

⁶² See, *e.g.*, *Morton Salt Co. v. G.S. Suppiger*, 314 U.S. 488 (1942) (patent misuse: where a patent is used, by means of tying, to secure monopoly power over products or services outside the scope of the patent's protection, a court will not enforce the patent in such a way as to assist such efforts); *B.B. Chem. Co. v. Ellis*, 314 U.S. 495, 498 (1942) (patent misuse: same, and all infringement suits will be denied until patent misuse is "fully abandoned"); *Alcatel*, 166 F.3d at 793 (copyright misuse: where a plaintiff "has used its copyrights to indirectly gain commercial control over products [the plaintiff] does not have copyrighted, then copyright misuse may be present"); *Practice Mgmt. Information Corp. v. American Medical Ass'n*, 121 F.3d 516, 521 (9th Cir. 1997) (copyright misuse: conditioning a copyright license on the licensee's promise not to use a competitor's products constituted misuse), *modified on other grounds*, 133 F.3d 1140 (1998); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1337 (9th Cir. 1995) (copyright misuse: where a plaintiff merely forbids outright copying of its copyrighted software, and does not attempt to prohibit legitimate reverse engineering of competing software, there is no copyright misuse).

⁶³ In last year's Digital Millennium Copyright Act, Congress addressed the use of technological measures to control access to copyrighted works. The new 17 U.S.C. § 1201 attempts to balance protection against infringement with access for legitimate uses by (1) prohibiting "circumvention" (*e.g.*, descrambling or decryption) of technological access control measures, and (2) instructing the Librarian of Congress to exclude from that prohibition, and to publish, works whose protection thereby would adversely affect noninfringing uses.

⁶⁴ See, *e.g.*, *B.B. Chem. Co.*, 314 U.S. at 498 (patent misuse: "It will be appropriate to consider [the patentee's] right to relief when it is able to show that it has fully abandoned its present method of restraining competition in the sale of unpatented articles and that the consequences of that practice have been fully dissipated."); *Alcatel*, 166 F.3d at 792, n. 81 (copyright misuse: "A finding of misuse does not...invalidate plaintiff's copyright. Indeed,...[plaintiff] is free to bring a suit for infringement once it has purged itself of the misuse.") (citation omitted).

V. THE COMMISSION'S PROPOSED ROLE UNDER H.R. 1858

The most noteworthy remaining feature of the Bill, and one that distinguishes it from all other proposals that the Commission has reviewed and from existing intellectual property and misappropriation laws, is that it assigns enforcement authority to the Commission.⁶⁵ This proposed assignment raises several issues.

(a) *Absence of criminal liability.* Unlike the 1998 bill, H.R. 1858 does not create any new criminal liability. Although willful copyright infringers can incur criminal liability,⁶⁶ misappropriation and other laws concerning the copying and dissemination of factual information have traditionally been purely civil. This tradition reflects First Amendment concerns and a salutary general policy favoring freedom of information. Moreover, the interpretive issues noted in Section V above and the residual ambiguities that are inherent in the enterprise of crafting a new legal regime to protect formerly unprotected works raise the concern that the threat of criminal liability could chill innovation and competition as a result of uncertainties in the law. It therefore appears appropriate to exclude criminal liability from the Bill.

(b) *Is a private civil right of action excluded?* Section 107 of H.R. 1858 confers jurisdiction on the FTC, but it does not expressly address whether a private right of action may be maintained to enforce the basic prohibition of Section 102. The Commission tentatively interprets the Bill, in the light of Supreme Court precedent on implied rights of action,⁶⁷ as excluding any private civil right of action: the Bill appears to intend that database owners harmed by duplicates address their complaints to the Commission instead of the courts. However, the Bill is also somewhat ambiguous: Section 106(b) directs "a court," rather than the Commission, to consider a list of factors in determining the merits of a misuse defense. Express clarification of legislative intent in this regard could avert future litigation.

(c) *FTC Enforcement.* The Bill would entrust the Commission with its enforcement. The Commission appreciates the confidence of Congress and the recognition of the Commission's experience with the underlying policy issues that this appears to reflect. The Commission also appreciates that the threat of private actions could be used by market incumbents to threaten potential entrants, potentially raising difficult issues for courts called upon to interpret the misuse defense in Section 106(b).

However, the enforcement burden would appear to be considerable, particularly if the Commission were the sole statutory enforcer.⁶⁸ No federal administrative agency has previously had jurisdiction over claims of misappropriation or infringement of intellectual property-type rights, and the scope of issues that might arise in the emerging information economy under such a new legal regime is not easy to forecast. As noted above, the Bill would raise several complex rule-making and adjudicative issues, including assessing substantiality of investment, degree of copying, disaggregation of governmental and private content in databases, what constitutes

⁶⁵ H.R. 1858, § 107.

⁶⁶ 17 U.S.C. § 506(a).

⁶⁷ See, e.g., *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996) ("where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, . . . 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute.") (citation omitted).

⁶⁸ If, as the Commission understands, state common law misappropriation suits involving databases will generally be preempted under Section 105(b), such cases would be effectively federalized and further add to the enforcement burden.

If called upon to enforce the legislation, the Commission would, of course, exercise its best judgment as to enforcement priorities. Section 107(d) provides that the Commission "shall prevent" violations "in the same manner, by the same means, and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this title." This appears to incorporate by reference the Commission's enforcement discretion under Section 5(b) of the FTC Act, which instructs the Commission to issue a complaint respecting a violation "if it shall appear to the Commission that a proceeding by it in respect [of the violation] would be to the interest of the public." It is well established that this standard gives the Commission wide latitude in the allocation of its scarce enforcement resources. See, e.g., *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Encyclopedia-Britannica, Inc. v. Federal Trade Commission*, 605 F.2d 964 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980); see also *Montgomery Ward & Co. v. Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967) (court of appeals has no general authority to second-guess Commission's determination of what is in the public interest); *Action on Safety and Health v. Federal Trade Commission*, 498 F.2d 757 (D.C. Cir. 1974) (Commission's decision to deny intervention to consumer protection organization was an agency action committed to agency discretion and therefore exempt from judicial review). Although the factors enumerated in Section 106(b) are addressed to "a court" rather than the Commission, the potential for misuse and competitive implications more generally would appear to be appropriate considerations in this context.

misuse, and the effects of the duplicate database on the original database creator's market and returns to investment.

Finally, Section 108 would create a further, reporting responsibility for the Commission. Under the jurisdiction conferred by Section 6 of the Federal Trade Commission Act, the Commission has substantial experience with gathering information, holding hearings and issuing reports on important matters of competition and consumer protection policy. The importance of the issues dealt with in the Bill, and the policy questions regarding the optimal balancing of access and protection that it raises, suggest that ongoing study could be valuable.

CONCLUSION

H.R. 1858 strives to strike a balance between protecting database producers from unfair free-riding and preserving factual information in the public domain and allowing transformative uses of databases and fair competition. Like traditional antitrust and intellectual property policy, it aims to stimulate both first- and second-generation innovation in the interests of consumers.

The Bill demonstrates a responsiveness to competition concerns raised by the Commission last year in its definitions of the basic prohibition, permitted uses and exclusions, and the misuse defense. However, each of these definitions also gives rise to ambiguities and potential concerns, and the differences between the permitted uses under the Bill and the fair use defense in copyright may also warrant further examination.

The Bill's omission of criminal liability appears appropriate, given its potential chilling effects on speech, innovation and competition in this context. Its assignment of authority to the Commission would impose a significant new burden on the Commission's resources.

In sum, the Bill's approach to database protection applies sound general principles underlying antitrust and intellectual property policy to difficult issues raised by the emerging information economy, but raises several issues that may warrant further examination. The Commission stands ready to assist the Subcommittee or the full House Committee on Commerce in that examination if called upon.

PREPARED STATEMENT OF ASSOCIATION OF DIRECTORY PUBLISHERS

The Association of Directory Publishers (ADP) thanks Chairman Tauzin for the invitation to submit the following statement for the record in connection with the June 15, 1999, hearing of the Telecommunications, Trade, and Consumer Protection Subcommittee on H.R. 1858, the "Consumer and Investor Access to Information Act of 1999."

The Association of Directory Publishers (ADP) is a century-old international trade association of over 180 independent telephone directory publishers employing thousands of individuals throughout the country. ADP members provide consumers with telephone directories that include white and yellow pages listings, plus community information. These products are indispensable links in the communications network that binds communities together.

Consumers have benefited greatly from the competition that ADP's members have brought to the directory industry. Many of the innovations independent publishers have introduced are now standard in directories today. They were the first to introduce coupons and maps to directory products. Independent publishers created the first community sections with helpful local information, such as frequently called service and government numbers, school information, sports schedules, and seating diagrams for auditoriums and stadiums. Recently, independent publishers were the first publishers to add zip codes to the white page listings, again expanding the usefulness of directories. These enhancements were quickly copied by phone company publishers, thus making all phone books more useful to consumers and businesses.

The Association of Directory Publishers supports the inclusion of two sections in H.R. 1858 that will ensure the "status quo" for subscriber list information. These provisions would ensure that directory publishers continue to have access to subscriber lists (name, address and phone number) under the ruling by the Supreme Court in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) and Sec. 222(e) of the Communications Act.

Specifically, the applicable provisions in H.R. 1858 are the following:

Sec. 104 (e) Subscriber List Information.—

Protection for databases under section 102 does not extend to subscriber list information within the meaning of section 222(f) of the Communications Act of 1934 (47 U.S.C. 222(f)). Nothing in this subsection shall affect the operation of

section 222(e) of such Act, under which a telecommunications carrier provides, upon request, subscriber list information for the purposes of publishing directories in any format under nondiscriminatory and reasonable rates, terms, and conditions.

Sec. 105(d) Communications Act of 1934.—

Nothing in this title shall affect the operation of the Communications Act of 1934 (47 U.S.C. 151 et seq.) or the authority of the Federal Communications Commission.

As directory publishers, ADP members need complete and up-to-date subscriber list information to produce their products. Local phone companies must gather this information as part of providing local phone service, and they therefore have sole access to such information and monopoly control over it.

The local phone companies' directory publishing arms currently control 93% of the directory market, and the telephone companies have long used their control over subscriber list information to restrict our competitive access to this essential data. Their anti-competitive practices include unreasonable prices, refusal to sell updates, and even outright refusal to sell listings at any price or on any terms.

In response to years of anticompetitive behavior by phone companies and through the leadership of this Committee, Congress included language in the historic 1996 Telecommunications Act to ensure competition in the telephone directory business. In the new Section 222(e), Congress enunciated in plain terms the right of independent publishers to access subscriber list information under reasonable rates, terms and conditions. Sections 222(e) and 222(f)(3) of the Communications Act provide:

Subscriber List Information.—Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format. [47 U.S.C. 222(e)]

Subscriber List Information.—The term "subscriber list information" means any information—

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format. [47 U.S.C. 222(f)(3)]

The legislative history on this provision clearly documents the abuses ADP members suffered over the past decade. Some examples include: local exchange carriers charging excessive and discriminatory prices, requiring the purchase of listings on a bundled statewide basis when independent publishers needed only listings for one community, and, in some cases, outright refusals to sell listings or updates. Sec. 222(e) was enacted to prevent telephone companies from exercising their *de facto* monopoly over essential factual information—which arises entirely as a byproduct of their provision of regulated local telephone exchange service—to restrict or prevent competition in the unregulated and potentially competitive directory advertising business. See, e.g., House Rept. 104-204, Part 1, pp. 89-90; 142 Cong. Rec. E184 (daily ed. Feb. 6, 1996)(statement of Rep. Paxon); 142 Cong. Rec. H1160 (daily ed. Feb. 1, 1996)(statement of Rep. Barton).

In enacting this provision in 1996, the Commerce Committee and Congress intended to build on independent publishers' pre-existing ability to copy published listings, as authorized under the 1991 *Feist* case. The statute was meant to promote reasonable licensing agreements, not revoke the ability of independent publishers to copy listings in cases where licensing agreements are not concluded.

The *Feist* case is named for Tom Feist, who is an ADP member. Mr. Feist was left with no choice but to copy listings in order to provide consumers a convenient, one-book directory covering eleven different service areas, because one of the telcos refused to license its listings to him. The Supreme Court ruled in Feist's favor, concluding that "[f]acts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted." (*Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 350 (1991)). Nor could the phone company secure a copyright in its compilation of these facts, because the *coordination* and *arrangement* of telephone listings in alphabetical order is "not only unoriginal, it is practically inevitable." (*Id.* at 363) Moreover, the Court noted that the phone company's *selection* of listings lacked the requisite originality because the state required the company

to publish the names and numbers of its subscribers as a condition of its monopoly franchise. (*Id.*)

Without Sections 104(e) and 105(d), which exclude subscriber list information from H.R. 1858, it could be argued that an independent publisher's use of such information violates Sec. 102's prohibition against distribution of duplicates.

The need for independent publishers to continue to rely on the ability to access listings—as affirmed by the Supreme Court in *Feist*—is best demonstrated by the fact that the abuses this subcommittee sought to end in enacting Section 222(e) continue unabated today. When reasonable licensing arrangements cannot be worked out with the phone companies, independent publishers are left with no alternative but to exercise the “last resort” option of doing what Tom Feist did and copy listings out of the phone company's book.

ADP believes that many local phone companies are violating Section 222(e). Actual examples of such illegal conduct include:

- Phone companies continue to earn profits only a monopolist can get away with. While one local phone company has testified that it earns a 1,300% profit when selling its listings for 4¢/listing, other local phone companies garner even more excessive profit margins because they sell listings for far more—40, 50, 60, 75 cents, even as much as 1.67 per listing.
- Local phone companies charge different prices for the exact same listing depending on how the publisher intends to use the directory. For instance, some local phone companies triple their price if the listing will be used in more than one printed directory and charge still more if the listing will be used in a CD-ROM directory.
- Several local phone companies simply won't provide updates to ADP members—these are new connects, disconnects and changes of address. Other local phone companies do provide updates, but impose unreasonable prices and restrictions.

Since the Telecommunications Act of 1996 was passed, a new and economically threatening problem has arisen for independent directory publishers. Incumbent local exchange carriers (ILECs) are now collecting subscriber list information from competitive local exchange carriers (CLECs) as a condition of interconnection agreements. While many ILECs have regularly passed these listings on to their own publishing affiliates, unfortunately, many ILECs have steadfastly withheld these CLEC listings from independent publishers, and even refused to pass them on when directly requested by a CLEC.

ADP members are fearful that even more egregious abuses would occur without *Feist*. The prices telephone companies charge independent publishers to license listings now are constrained, as a practical matter, primarily by the right of independent publishers to copy white pages listings. If that right were removed and copying deemed a misappropriation, then Congress' goal of ensuring reasonable pricing under Section 222(e) of the Communications Act will be seriously undermined.

The Copyright Office has recognized the special circumstances relating to phone listings in its August 1997 *Report on Legal Protection for Databases*. In cases involving sole source data, of which telephone subscriber information is a “prototypical example,” the Copyright Office observes, “[u]nless the producer chooses to make such data freely available, it is simply not possible for anyone else to obtain it independently.” (Copyright Office Report, 1997, p. 102)

Dr. Laura D'Andrea Tyson similarly has noted the special circumstances relating to telephone listings in her study, *Statutory Protection for Databases: Economic & Public Policy Issues*. She observes, “the factual situations of the *Feist* case [i.e., telephone listings] are in reality much closer to the kinds of concerns addressed in the antitrust law under the rubric of so-called “essential facilities” than they are to the kinds of concerns raised by a typical ‘database piracy’ case.” She concludes, “[w]hen data is generated by a government-created monopolist, it is not appropriate to allow the monopolist to control database products building on that data.” (Tyson and Sherry, 1997, pp. 24-25)

ADP appreciates the inclusion of Sections 104(e) and 105(d) in the bill. These provisions will preserve the policy established by Congress in Sec. 222(e), as well as allow publishers access to listings, in accordance with the *Feist* decision.



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AT&T
WASHINGTON, DC 20036
July 9, 1999

The Honorable W.J. TAUZIN
Chairman
Subcommittee on Telecommunications, Trade and Consumer Protection
316 Ford House Office Building
Washington, D.C. 20515

Re: H.R. 1858

DEAR CHAIRMAN TAUZIN: In response to your questions at the June 16 hearing on H.R. 1858, the Consumer and Investor Access to Information Act of 1999, AT&T's witness, Mr. Frank Politano, would like to submit additional material for inclusion in the hearing record. This material is attached.

If there is anything additional that AT&T can do to be helpful to you and the members of the Subcommittee as work continues on H.R. 1858, please do not hesitate to contact me.

Sincerely,

JOT D. CARPENTER, JR.

Attachment

cc: The Hon. Thomas J. Bliley, Jr.
The Hon. Edward J. Markey

ADDITIONAL COMMENTS OF AT&T FOLLOWING THE JUNE 15 HEARING OF THE TELECOMMUNICATIONS, TRADE AND CONSUMER PROTECTION SUBCOMMITTEE OF THE HOUSE COMMERCE COMMITTEE ON H.R. 1858:

1. SECTION 104(B) DATABASES RELATED TO INTERNET COMMUNICATIONS

As we stated in our written testimony, we believe that it is important to make clear that all databases associated with the operation of the Internet are exempted from the scope of the bill. The current exemption for "the function of addressing..." arguably includes the Internet domain name zone files, which must be replicated across many parties to ensure the proper functioning of the Internet. But it should also expressly include databases related to the assignment and registration of Internet domain names. A clarification of this nature would protect these databases from commercial ownership and preserve the proper functioning of the Internet. It would also ensure that companies have access to information vital to police their brands and identify trademark infringements. It is also important that this clarification be made in a way that allows for changes that may be made to Internet naming schemes in the future. Internet domain naming schemes are an evolving area (being worked at the Internet Engineering Task Force, for example).

Proposed addition to 104(b):

(3) in the course of assigning or registering Internet addresses or domain names

2. SHOULD CONGRESS RELY ON EXISTING STATE MISAPPROPRIATION LAWS TO ADDRESS THE ISSUE OF DATABASE PROTECTION?

During the hearing, Chairman Tauzin invited witnesses to comment further on the adequacy of current state laws in this area. AT&T has considered this issue carefully and does not believe state misappropriation laws adequately or appropriately address the issue. Reliance on state misappropriation laws would lead to inconsistent results, forum shopping and is antithetical to national treatment of intellectual property matters.

State common law unfair competition doctrine has sometimes provided a remedy for "misappropriation" claims usually relating to the narrow issue of dissemination of "hot news". The current federal copyright statute, however, preempts state law claims that enforce rights "equivalent" to exclusive copyright protections when the work at issue falls within the scope of copyright protection.

Federal copyright law has thus narrowed the cognizable claims under state law and, as recently expressed in *National Basketball Ass'n v. Motorola, Inc.*, 105 F. 3d 841 (2 Cir. 1997), has limited state misappropriation claims to "hot news" cases where each of the following elements must be met: (1) a plaintiff generates information at a cost; (2) the information is time sensitive; (3) the defendant is in direct competition with the plaintiff; (4) the defendant uses the information to free-ride on the plaintiff's efforts; and (5) the ability of other parties to free-ride on the plaintiff's efforts would so reduce the incentive to produce the generic or product featuring the information that its existence or quality would be substantially threatened.

While *Motorola* may provide adequate protection for "hot news", we understand the desire to protect beyond the "hot" period. It is unclear whether the states would be willing to push beyond the hot period. This would take time and create uncertainty. Reliance on state law to vest exclusive rights in works that Congress intended to be in the public domain would violate constitutional principles and encourage states to legislate further misappropriation laws that would certainly conflict or be inconsistent with each other. This would lead to a welter of different substantive laws, remedies and procedures and would encourage forum-shopping.

If a new property right is to be created, AT&T believes a federal substantive law should be enacted to provide uniform application and remedies.

3. A PRIVATE CAUSE OF ACTION?

AT&T is not convinced that H.R. 1858 should provide a private cause of action because of the very real possibilities of needless litigation and the consequent burdens and chilling effect this would have on all companies, large and small.

However, if Congress does decide to adopt a private cause of action, it should consider following the British rule of loser pays all—namely, the litigant that lost a claim brought under the statute would pay not only its attorney fees and costs but also those of the prevailing party. This would have two ameliorative consequences. First, it would encourage parties to adhere to the law for fear of losing a lawsuit and its attendant economic consequences. Second, it would discourage needless and frivolous litigation because a potential plaintiff would refrain from bringing an action unless it felt reasonably certain of success and not facing the risk of paying the defendant's attorney fees and costs.

4. SECTION 106 SERVICE PROVIDER LIABILITY

Lastly, we suggest that H.R. 1858 include its own definition of services provider, rather than relying on definitions in the Communications Act, to make it clear that the limitation of liability in Section 106(a) covers Internet service providers, which are not necessarily providers of telecommunications services or information services as defined in existing law. We would therefore propose striking the parenthetical reference to the Communications Act in Section 106(a), and adding a new definition of "services provider" in Section 101, as follows:

(6) **SERVICES PROVIDER.**—The term "services provider" means any person or entity that operates a facility or offers a capability for the electronic transmission, generation, acquisition, storage, transformation, processing, retrieval, utilization or making available of information.

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